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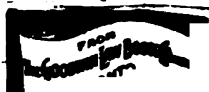
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ARREST UPON CIVIL PROCESS,
In the Supreme Court of Judicature.

WITH THE
PRACTICE AND FORMS.

BY
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PREFACE TO THE FIRST EDITION.

THE subject of which this Book treats does not appear (at any rate, in modern times) to have been dealt with in a separate treatise. The matter dealt with is of great public importance, and concerns the public at large quite as much as the legal profession, because Contempts of Court frequently arise from ignorance on the part of laymen of the law upon the subject—which law is so elastic that it is difficult to define or limit it in its length and breadth, depth and height. It has often been contended that it ought to be defined and limited (both as to the offence itself, and its punishment) by Act of Parliament.

The Author has for some years past been engaged in several of the cases, both reported and unreported, bearing upon the subject of Contempt of Court, and having found in practice that useless expense has often been incurred, and sometimes even justice defeated, by reason of slips in practice in endeavours to enforce obedience to orders by process for contempt, he has thought that it may prove useful to collect together the law and practice upon the matter in a separate treatise, and he has endeavoured to do so in this work. In fact, the Author may, without presumption, say that his

having happened to have been retained in several cases on the subject has given him that *familiarity* with it which has *bred* his Book upon *Contempt*.

It is hoped that the Chapter upon "Procedure and Practice" will prove useful to the practitioner. It is believed that, except in Bankruptcy, there are no powers of imprisonment in civil proceedings in the Supreme Court of Judicature other than those referred to in this Book; and the Author hopes that it may prove useful to have collected together (even imperfectly) the law and practice of the Supreme Court upon the important subject of imprisonment in civil proceedings. The powers of punishing by imprisonment in Bankruptcy are special (conferred by Act of Parliament and otherwise), and more naturally come within the scope of treatises upon the law and practice in Bankruptcy.

The authorities cited have been brought down to the end of 1891.

The Author is conscious that this little Book contains many imperfections, but he asks for it that kind consideration which he individually has never failed to receive from every member of the Legal Profession with whom he has been associated.

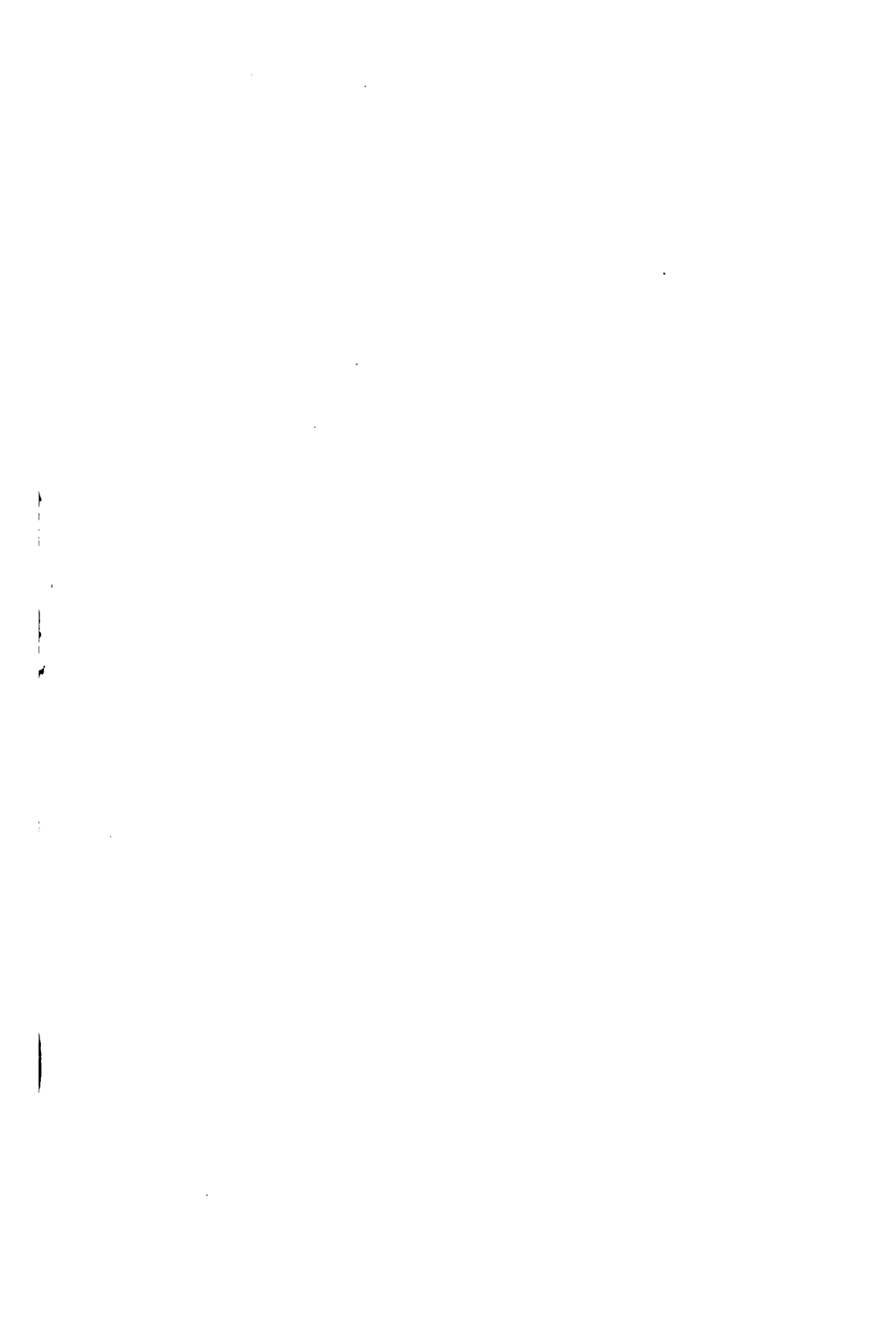
The Author is much indebted to G. Lavie, Esq., one of the Registrars of the Supreme Court, for his kindness in permitting the publication, by way of Appendix to this Book, of his valuable Memorandum on the Practice in Committal and Attachment.

6, NEW SQUARE, LINCOLN'S INN,
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PREFACE TO THE SECOND EDITION.

THE Author has to thankfully acknowledge the indulgent and considerate reception given to the First Edition of this Treatise by the Profession, and indeed by the public in general. The Author has now the pleasure to submit a second, and enlarged, and revised edition of his Book, in which the subject will, he thinks, be found to be both better arranged, and usefully amplified. Many additions and some corrections, from time to time kindly suggested by various members of the Profession, have been made; and the cases have been brought down to date. In the Table of Cases references have been given, not only to the Law Reports, but to all other Reports. The Author hopes that this Edition will be found to be more complete and useful than the last. The Author, in his work upon this Treatise, has come to experience quite an *attachment* for its subject, and he has accordingly *committed* himself with pleasure to the labours of producing this new Edition of it.

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CONTEMPT OF COURT.

CHAPTER I.

INTRODUCTION—ORIGIN AND EXTENT OF THE JURISDICTION IN CONTEMPT.

CONTEMPT, in the legal acceptation of the term, primarily signifies disrespect to that which is entitled to legal regard; but as a wrong purely moral, or affecting an object not possessing a legal status, it has in the eye of the law no existence.

Legal
signifi-
cance of
contempt.

In its origin, all legal contempt will be found to consist in an offence more or less direct against the Sovereign himself as the fountain-head of law and justice, or against his Palace, where justice was administered. This clearly appears from the old cases. One is thus stated: "J. of F. went armed in the Palace, which was shown to the Council of the King, by which he was taken and disarmed before Justice Shard, and committed to the prison of the Marshalsea, and could not be bailed till the King had sent his Will" (5 Vin. Abr. Tit. "Contempt," p. 442, citing 24 Edw. 3-38). In another case, that of *Roger de Dalham* (19 Edw. 1, Mem. Scacc.), before the Barons of the Exchequer, it was determined that by the Common Law of the Kingdom, he who has

In its
origin an
offence
against the
Sovereign
or his
Palace.
Case temp.
25 Edw. 3.

Case of
*Roger de
Dalham* (19
Edw. 1).

to render accounts whatsoever not yet paid to the King, is liable to be arrested until he has fully rendered and satisfied such accounts. And Roger, not having computed or rendered an account to the King in respect of the expenses of John, Duke of Brabant, in the King's Palace, all the lands, goods, and chattels of Roger were put in the King's hands, and Roger was held bound to answer the King for *contempt*. In the case also of the *Prior of Plymouth* (38 Edw. 3, Lib. Ass., 228), it appears that the King had lodged a Chaplain in a room of the Priory at Plymouth, and that the Prior did not wish to receive him, on which account he was commanded to come before the King's Council to reply to the King for *contempt*. He came and denied that the Priory was a royal foundation, or that the King was patron. The King put in his plea; and the verdict was to the effect that the King and his ancestors were the patrons of the Priory, and that the site had continued in the royal possession, and that the King had the right of patronage, and that the Prior had made himself patron without the King's leave to the disherison of him and his crown. The Court gave the patronage to the King, and the Priors' temporalities were put into the King's hands by reason of his disherison and *contempt* of the King's rights, and imprisonment of his body during pleasure was ordered.

Case of the
Prior of
Plymouth
(38 Edw.
3).

Antiquity
of the
jurisdiction
to
punish for
contempt
of Court.

“The Power, which the Courts in Westminster Hall have of vindicating their own Authority, is coeval with their first Foundation and Institution; it is a necessary incident to every Court of Justice, whether of Record or not, to fine and imprison for a contempt to the Court, acted in the face of it (1 Vent. 1). And the issuing of attachments by the Supreme Courts of Justice

in Westminster Hall, for contempts out of Court, stands upon the same immemorial Usage, as supports the whole Fabric of the Common Law; it is as much the '*Lex Terræ*,' and within the exception of *Magna Charta*, as the issuing any other Legal Process whatsoever" (*Rex v. Almon*, Wilm. Notes at p. 254).

In the Superior Courts the power of committing for contempt is inherent in their constitution, has been coeval with their original institution, and has been always exercised. The origin can be traced to the time when all the Courts were divisions of the great *Curia Regis*—the Supreme Court of the Sovereign, in which he personally, or by his immediate representative, sat to administer justice (*per* Cockburn, C.J., in *Reg v. Lefroy*, L. R. 8 Q. B., at p. 187, and *sub nom Ex parte Lefroy*, 42 L. J. Q. B., at p. 123).

The power of the Superior Courts in the matter.

The King could, and did, pardon contempts. This appears from the case of William Charles, the Major (or Mayor) of Sandwich (22 Edw. 1, Mich. Mem. Scacc.), who was committed by a Baron of the Exchequer because he "would not answer the Court." This was "held a *contempt* for which he was sent to prison and fined," but the King of his clemency *pardoned the contempt*. And in the case of Richard de C. (referred to in Brabson's Case, Lib. Ass. 39 Edw. 3, 231), who was convicted of contempt in striking a juror at Westminster and sentenced (*inter alia*, to lose his right hand), it appears that the King *pardoned* the loss of the hand. And in Brabson's Case (*supra*) it was left to the King to determine the fine to be inflicted for contempt in assaulting a party in the presence of the Judges.

The Sovereign can pardon contempts. Case of Mayor of Sandwich (22 Edw. 1).

Case of Richard de C. (39 Edw. 3).

Brabson's Case (39 Edw. 3).

There appears also to be an appeal to the Sovereign from an order of a Judge of Assize punishing for con-

An appeal also lies to the

- Sovereign in the matter. tempt (*Ex parte Fernandez*, 10 C. B., N. S., at pp. 25, 30, L. J. C. P., at p. 328). The Royal Prerogative extends to the remission of sentences which are merely of a punitive character inflicted for Contempt of Court; and
- A Governor of a Colony can pardon a contempt. the Governor of a Colony has vested in him power to exercise this prerogative, and can pardon or remit a sentence for a contempt of Court committed in his Colony. *In re a special reference from the Bahama Islands* [1898] A. C. 138. In *Rainy v. Justices of Sierra Leone* (8 Moo. P. C. 47) the Queen was advised that she could by virtue of her royal prerogative remit fines for contempt.
- The Sovereign can remit fines for contempt. Of the primary species of contempt, which involved contempt of the King personally (as by departing out of his Realm without his leave, or, by refusing to return into the Kingdom upon his mandate, or by coming near to or within the limits of his Court or Kingdom when banished therefrom), and what is more technically called misprision, which includes misfeasances committed against the person and government, the prerogative, the title, or the palace of the Sovereign himself (Bl. Com. Bk. iv., c. 9, ii.; Petersdorf Abr. Tit. "Contempt"), it is not proposed to treat in this work; but
- Contempt of Sovereign personally not here dealt with. to consider only contempt in *its secondary or derivative aspect, as an offence against the Courts* or persons to whom the judicial functions of the Crown are delegated, or (as it is commonly called) "Contempt of Court;"
- But only contempt of his Courts, and Judges. that is, of the judicial Courts; and not contempt of the High Court of Parliament; which will be found dealt with in treatises dealing with "Parliament."
- And not of Parliament. Contempt of Court (which has been irreverently termed "a legal thumbscrew") is so manifold in its
- Definition of contempt of Court. aspects that it is difficult to lay down any exact

definition of the offence. In Viner's Abridg. (tit. Contempt A), it is defined or described to be "a disobedience to the Court, an opposing or a despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court." (See *per* Williams, J., in *Miller v. Knox*, 4 Bing. N. C. at p. 588.) Defined shortly (as it was by Sir Wm. Blackstone), "contempt is a disobedience to the rules, orders, or process of a Court, or against the King's prerogative." These short definitions (good as far as they go) are scarcely sufficient. Lord Chancellor Hardwicke, in the case of the printer of the *St. James's Evening Post* (2 Atkyns, at p. 471), said, "There are three different sorts of contempt, one kind of contempt is *scandalizing the Court itself*. There may be also a contempt of this Court in *abusing parties who are concerned in cases here*. There may be also a contempt of this Court in *prejudicing mankind against persons before the cause is heard*;" and he adds, "There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

Per Lord Hardwicke, there are three kinds of contempt.

Contempt of Court and its punishment is thus described in the Practical Register in Chancery, pp. 138, 134; "a contempt is a disobedience to the Court, or an opposing or despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court. Sometimes it arises by one or more; their opposing or disturbing the execution

Description of contempt of Court in Practical Register in Chancery.

“or service of the process of the Court, or using force to
 “the party that serves it; sometimes by using words
 “importing scorn, reproach, or diminution of the Court,
 “its process, orders, officers, or ministers, upon executing
 “or serving such process or orders. It is also a contempt
 “to abuse the process of the Court by wilfully doing any
 “wrong in executing it; or making use of it as a handle
 “to do wrong; or to do anything under colour or pretence
 “of process of the Court without such process or autho-
 “rity. For any direct and positive contempt, a party may
 “not only be taken into custody, but committed to the
 “Fleet during the pleasure of the Court. But for a bare
 “contempt in not doing somewhat, then only till he obey
 “and perform; for a contempt in doing somewhat against
 “the order of the Court is accounted much greater than
 “omitting to do somewhat commanded, seeing the one is
 “wilful the other not always so; and besides, what is
 “only not done may be done; but what is once done
 “cannot be undone, though its effects may often be
 “made to cease, or reparation may be made.”

Contempt
of Court
involves
two ideas.

Contempt of Court involves two ideas, *contempt of its power* and *contempt of its authority*—the word *power* involving the ability to enforce obedience to its orders, and the word *authority* its jurisdiction to declare the law and the rights of parties *Rex v. Almon* (Wilm. Notes, 256).

General
definition
of Con-
tempt of
Court.

Speaking generally, Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with, or prejudice parties litigant, or their witnesses during the litigation. For a definition of Contempt, see the opinions of the judges in *Miller v. Knox* (4 Bing. N. C. 574). Though every

act of disobedience to the rules, orders, process, or dignity of a Court may technically be termed a *contempt*, the term is generally, or at least with greater propriety, applied to any disrespect or indignity offered to judges while sitting in judgment, or on account of their proceedings in their judicial capacity ("Bell's Digest of the Law of Scotland," p. 224).

The most flagrant kind of Contempt of Court is *direct*, ^{Direct contempt of Court.} and consists in some open and spontaneous insult, or resistance to the persons of the judges or the powers of the Court (Bl. Com. Bk. iv. c. 20, iii.). Happily, this form of the offence has now little more than a technical existence, and, perhaps the only danger of its revival or survival would seem to lie in the possible growth of the practice (lately become rather prevalent) of suitors conducting their cases in person. It was formerly at least considered a necessary incident of every Court of justice, whether of record or not, to fine and imprison for a Contempt of Court acted in the face of it (Wilm. Notes, at p. 254; 1 Vent. 1). The right is as much a part of the law of the land as trial by jury (Wilm. Notes, p. 253). On the other hand, contempts committed otherwise than *in facie curiæ* can only be dealt with as such by superior Courts of record and not by County, or other inferior Courts (*Reg. v. Lefroy*, L. R. 8 Q. B. 134).

The *consequential or more indirect form of Contempt of Court* ^{Indirect contempt of Court.} arises in the disobedience to, or neglect of the mandates or orders of the Court; and this branch of the subject possesses great claim to attention, inasmuch as in many such cases it is only through the medium of process for contempt that the rights of the suitor can be secured or enforced.

Special
contempts.

Closely allied with this latter class are a variety of contempts which may be termed *special*. These comprise omissions of the duties which are cast upon the ministers of the law in their character as such, or upon individuals as members of the State, as well as offences committed against persons entitled to the protection of the Court, and malpractices exercised under colour of legal authority or process.

Contempts
vary in
degree.

Contempts vary also in degree, *some taking rank as criminal offences*, and others being regarded as of a less heinous nature; a difference which will be found of importance in considering the consequences and punishment incurred, and the right of appeal.

Punish-
ment for
contempt
by persons.

Contempt of Court is punishable in the case of persons summarily by fine or imprisonment, or both; or by a fine accompanied by imprisonment until paid; or by ordering sureties to be found for good behaviour; and by an order to pay the costs of the proceedings taken to punish the contempt. These costs may be ordered to be taxed and paid as between solicitor and client. The law enables the Court or a judge to send an offender to prison for contempt of Court with a rapidity which may be described as "*Oriental*." Contempt is also punishable as a misdemeanour by indictment and sentence upon conviction in the cases of contempt by interference with the course of justice.

Indictment
as for a
misdemeanour.

Punish-
ment of
contempt
by Corporations.

In the case of Corporations contempt of Court is usually punished by the sequestration of their property, but in the case of directors or other officers of any Corporation, responsible for or privy to any contempt by the Corporation, such directors or other officers may be made personally answerable for the contempt, and punished accordingly. (See *Ex parte Green and*

Others, In the matter of the Press Association, 7 Times L. R. 411). No attachment lies against a Corporation in contempt, the mode of compulsion is by sequestration No attachment against Corporations. (*Rex v. Windham*, Cowp. 377).

Although there has been no modern instance of an indictment for contempt, it is laid down by the authorities (Hawkins' Pleas of the Crown, 8th ed. vol. i. p. 68; vol. ii. p. 289; Russell on Crimes, 5th ed., vol. i. p. 188, and *Earl of Thanet's Case*, 27 State Trials, p. 822), that contempt, in interfering with judges, or the course of justice, is an indictable offence. Such an offence is a misdemeanour at Common Law, and in such cases the proceeding by attachment or committal is merely supplementary to that by indictment. An interference with the course of justice is a *public injury* (*Skipworth's Case*, L. R. 9 Q. B. 230). In Mich. 31 & 32 Eliz. (when the dispute between the Court of Chancery and the Courts of Law as to jurisdiction ran high) it appears that a certain *Counsel was indicted for contempt* in signing a Bill filed in Chancery praying for an injunction against an execution at law. The indictment, however, was not brought to trial (Crompton on Courts, 57-8). As to indictments for contempt criminal in their nature.

If, on the other hand, the contempt is mere disobedience of an order of the Court in a civil action it is not criminal, and in such a case the punishment is only ordered in the cause for the purpose of enforcing the order in the civil action, and the proceeding is by attachment or committal. Contempts not criminal and their punishment.

Contempt of Court by disrespect or insults offered to a Judge or to the dignity of the Court is a criminal offence: *In re Pollard* (L. R. 2 P. C. 106). It may either be at once punished by the offended Court, or Insults to Court a criminal offence. How punished.

dealt with subsequently on notice by attachment or committal. See *Phillips v. Hedges* (Trin. T., 10 Geo. 2, Cooke's Rep. 182). It may also be punished by indictment.

A charge of contempt of Court should be specific, &c.

The specific offence charged should be distinctly stated where the contempt is criminal in its nature, and an opportunity given of answering it (*In re Pollard*, L. R. 2 P. C. 106). However, in all cases of contempt the charge should be specifically made; each step in the proceedings to punish it should be fairly, properly, and strictly taken (*In re Ramsay*, L. R. 3 P. C. 427), and the punishment for it should be as far as possible commensurate with the offence—severe in serious and deliberate cases, but an apology and payment of costs may satisfy less serious forms of contempt. It has been said that: "The mysterious and indefinable offence known as 'Contempt of Court,' would seem to be as easy to commit as it is liable to prompt and condign punishment."

And the punishment commensurate with the offence.

All Courts must vindicate their authority.

"There is probably no country in which Courts of Law are not furnished with the means of vindicating their authority and preserving their dignity by calling in the aid of the executive in certain circumstances without the formalities usually attending a trial and sentence. Of this the simplest instance is where the Judge orders the officers to enforce silence or to clear the Court" (Chambers's Encyclopædia, tit. "Contempt of Court")—"Every Court of Record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the Court, as by giving

opprobrious language to the Judge, or obstinately refusing to do their duty as officers of the Court, and may immediately order them into custody" (2 Bacon's Abridg., 7th ed. p. 399).

It is the undoubted right of a superior Court to com-
mit for contempt; and there is no necessity to specify
the particular matter which constitutes the contempt,
per Erle, C.J., in Ex parte Fernandez (10 C. B., N. S.,
at p. 6), citing the *Case of the Sheriff of Middlesex* (11
Ad. & E. 273; 8 Dowl. P. C. 451 *nom. The Queen v. Evans*). But the practice now requires that the alleged
offence should be specified. The usual criminal process
to punish contempts was found to be cumbrous and
slow, and therefore the Courts early assumed jurisdiction
themselves to punish the offence summarily, *brevi manu*,
so that cases might be fairly heard, and the administra-
tion of justice not interfered with. A Court of Justice
without power to vindicate its own dignity, to enforce
obedience to its mandates, to protect its officers, or to
shield those who are entrusted to its care, would be an
anomaly which could not be permitted to exist in any
civilized community. "From the earliest period of
our history this authority has been exercised. The
year-books record instances of such commitments" (*per*
Best, J., in *Rex v. Davison*, 4 Barn. & Ald. at p. 340).

Inherent
power of
committal
in Superior
Courts.

The offence
punished
summarily.

It is, therefore, but consonant with sound sense that
we should find it an acknowledged principle that the
power of summarily punishing for contempt has been
inherent in all Courts of Record from time immemorial
—see the opinion of the Judges in *Miller v. Knox* (4
Bing. N. C. 574); *Rex v. Almon* (Wilm. Notes, 248);
Bl. Com. (bk. iv. cap. 20, iii.)—and is coeval with their
foundation and institution as part of the law of the

The power
to punish
for con-
tempt was
always in-
herent in
Courts of
Record.

land (Wilm. Notes, at p. 254). Without such protection Courts of Justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible. Hence it is that the summary power of punishing for contempt has been given to the Courts—"to keep a blaze of glory round, and to deter people from attempting to render them contemptible in the eyes of the public" (Wilm. Notes, at p. 270).

Dicta of
Erle, C.J.,
on the
reason for
this power.

In speaking of the power to punish for Contempt of Court, Erle, C.J., made the following observations: "There are many ways of obstructing the Court. Endeavours are not wanting either to disturb the Judge or to influence the jury, or to keep back or pervert the testimony of witnesses, or by other methods according to the emergency of the occasion, to obstruct the course of justice. These powers are given to the Judges to keep the course of justice free; powers of great importance to society, for by the exercise of them law and order prevail; those who are interested in wrong are shown that the law is irresistible. *It is this obstruction which is called in law contempt*, and it has nothing to do with the personal feelings of the Judge, and no Judge would allow his personal feelings to have any weight in the matter. According to my experience, the personal feelings of the Judges have never had the slightest influence in the exercise of those powers entrusted to them for the purpose of supporting the dignity of their important office; and, so far as my observation goes, they have been uniformly exercised for the good of the people" (see *Ex parte Fernandez*, 30 L. J. C. P., at p. 332). "The law has armed the High Court of Justice with the power, and

Dicta of
Lord
Bowen on

imposed on it the duty of preventing, *brevi manu*, and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated notion of the dignity of individuals, that insults to Judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed. The principle is that those who have duties to discharge in a Court of Justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to Courts of Justice" (*per* Bowen, L.J., in *In re Johnson*, 20 Q. B. D., at p. 74). The power to punish for contempt has been vested in the Judges not for their personal protection only, but for that of the public, whose interest it is that decency and decorum should be preserved in Courts of Justice (*Rex v. Davison*, 4 B. & Ald. 329, 333, 335).

the same
subject.

The power
to punish
is given
for the
public's
protection.

The most extensive jurisdiction in respect of contempt is that originally attaching to the Superior Courts of Record (Hawk. Pl. Cr. bk. 2, cap. 22), including the Commissioners of Assize under their various commissions: *Ex parte Fernandez* (10 C. B., N. S., 3), which gives them full cognizance of and power to deal with every species of contempt. A Court of Oyer and Terminer at the Assizes is a Superior Court (*Re McAleece*, 7 Ir. C. L. 146), and has full jurisdiction in matters of contempt. There is no appeal except to the Sovereign from an order of Judges of Assize committing or fining for contempt (*Ex parte Fernandez, supra*). The jurisdiction in this, as in other matters, of the old Superior Courts at Westminster is now by virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66,

Authority
of the
Superior
Courts to
deal with
contempt.

s. 16), vested in Her Majesty's High Court of Justice, and is exercisable by the several Divisions of that tribunal. The Court of Appeal also, as a Superior Court of Record (36 & 37 Vict. c. 66, s. 18), has a similar jurisdiction either original or derivative; and equal authority in this respect is included in the jurisdiction of the Lord Chancellor and the Lords Justices in Lunacy: *Ex parte Jones* (13 Ves. 237). A Master in Lunacy may commit for contempt while executing an inquisition with a jury (*Lunacy Act*, 1890, s. 99; *In re B.* [1891] 3 Ch. 274-6), or without a jury (*Lunacy Act*, 1891, s. 29; *In re B.* [1892] 1 Ch. 459). It is also a contempt of Court to do anything calculated to prejudice the trial of a pending election petition (*Re South Meath Election Petition*, the "*Times*," 12th November, 1892).

Lords Justices and Masters sitting in lunacy may deal with contempt.

Contempt dealt with on Election Petitions.

Authority of Inferior Courts of Record to deal with contempt.

Though it is only proposed to discuss in this treatise contempt in relation to the Supreme Court, it may not be out of place to advert here shortly to the authority possessed by other Courts in this matter. The jurisdiction of Inferior Courts of Record (such as the Court of Quarter Sessions, the Mayor's Court, and County Court) is confined to such contempts as are perpetrated *in facie curiæ* (as in *Reg. v. Lefroy*, L. R. 8 Q. B. 134, and *Reg. v. Jordan*, 57, L. J. Q. B. 483), and does not extend to such as are committed out of Court unless by virtue of some statutory enactment (*Reg. v. Lefroy*, *supra*, *Reg. v. Judge of Brompton County Court* [1893], 2 Q. B. 195. *Ex parte Pater*, 5 B. & S. 299; *Carus Wilson's Case*, 7 Q. B. 984). A County Court Judge has no jurisdiction to commit for contempt not committed in the face of the Court as provided by the County Courts Act, 1846 (re-enacted in the Stat. of 1888); see *Reg. v. Lefroy*

(*supra*). But a County Court Judge sitting in Bankruptcy has the powers and jurisdiction of a Judge of the High Court, and has the like power to commit (*Reg. v. Judge of County Court of Surrey*, 13 Q. B. D. 963). A County Court Judge has no power to deal summarily with contempt in practising in his Court as a Solicitor without being duly qualified; which offence is created a contempt by sec. 26 of the Solicitors' Act, 1843 (*Reg. v. Judge of Brompton County Court, supra*). But a County Court has under sec. 89 of the Judicature Act, 1873, with regard to all causes of action within its jurisdiction, power to enforce obedience to its orders by committal; this power extends to interlocutory as well as to final orders (*Richards v. Cullerne*, 7 Q. B. D. 623). No appeal lies from an order of a County Court Judge imposing a fine under sec. 48 of the County Courts Act, 1888, for assaulting an officer of the Court (*Lewis v. Owen* [1894], 1 Q. B. 102). The Mayor's Court is an Inferior Court (*Mayor of London v. Cox*, L. R. 2 H. L. 239, and *Appleford v. Judkins*, 3 C. P. D. 489). Courts not of Record have no jurisdiction to punish for contempt of Court unless it is specially conferred by statute (*McDermott v. Judges of British Guiana*, L. R. 2 P. C. 341). Magistrates sitting alone or in petty or special sessions appear to be under a like disability, though they may enforce order in their Courts by ejecting any offender (Oke Mag. Syn. 12th ed. 150; see also Burn's J.P., 30th ed., vol. iii., 142); a Revising Barrister has only the like power (28 Vict. cap. 36, s. 16; *Willis v. Maclachlan*, 1 Ex. D. 376). The Royal Court of Jersey (*Carus Wilson's Case*, 7 Q. B. 984); the Chancery Court of the Isle of Man (*In re Crawford*, 13 Q. B. 613); and the House of Keys in the Isle of Man, acting in the exercise

Courts not of Record no jurisdiction to deal with contempt. Magistrates no power to deal with it; nor Revising Barrister. Royal Court of Jersey and Manx Courts can deal with it.

of its judicial, but not of its legislative, functions (*Ex parte Brown*, 5 B. & S. 280), have all power to commit for contempt; and where it is consistent with the practice of the particular Court it may commit "until further order" (*In re Crawford, supra*). A general committal for contempt is lawful (*In re a special reference from the Bahama Islands* [1893] A. C. at p. 145, overruling, it is presumed, in this respect *Rex v. James*, 5 B. & Ald. 894). But such a committal is not, it is submitted, desirable in practice.

Contempts
of Judges,
&c., in
Chambers
cannot be
punished
by them.

Contempts committed before Judges of the High Court in Chambers, and before the Official Referees, Masters, Registrars, Chief Clerks, or other officers of the High Court to whom quasi judicial functions are delegated (whose offices are part of the Court itself), or within the precincts of their Chambers, are properly cognizable and punishable by the Court to which the Judges or officers are attached, and not punishable by themselves (*French v. French*, 1 Hog. 138; *Ex parte Burrows*, 8 Ves. 535; *Ex parte Wilton*, 1 Dowl., N. S., 805; *Re Johnson*, 20 Q. B. D. 68); though they would presumably have power in a case of insult or disturbance to eject

But Courts
will sub-
sequently
punish for
such con-
tempts.

the offender or suspend their sitting. But the Court, to which any such Judge or officer is attached, can and will subsequently punish for any such contempt (*In re Johnson, supra*, and see *Kirby v. Webb*, 3 Times L. R. 763). It would seem therefore that for insults offered to a Judge sitting in Chambers he cannot himself punish, but that the Court will on application made to it for the purpose punish such an offence (*In re Johnson, supra*; *In re Tyrone Election Petition, Carson's Case*, Ir. Rep. 7 C. L. 242). A Judge sitting as a Court can make an order of committal wherever he may sit,

A Judge
can commit
wherever

and even at his residence (*In re Clarke*, 11 L. J. Q. B. 75, and see *Petty v. Daniel*, 34 Ch. D. 172). The rules of the Supreme Court expressly provide (Order xxxvi., rule 51) that an Official Referee shall not attach or commit. It is a contempt of Court to insult a suitor or his counsel while attending in the Master's office, and if such a contempt is committed, the party will be attached at once on the production of the Master's certificate (*French v. French*, 1 Hog. 138). Breaking open a desk in the Registrar's office was dealt with as a contempt of Court (*Ex parte Burrows*, 8 Ves. 535).

sitting as a Court. Official Referees cannot commit.

Breaking open Registrar's desk.

It should always be borne in mind in considering and dealing with contempt of Court that it is an offence purely *sui generis*, and that its punishment involves in most cases an exceptional interference with the liberty of the subject, and that, too, by a method or process which would in no other case be permissible, or even tolerated. It is highly necessary, therefore, in all questions of this nature, where the functions of the Court have to be exercised in a summary manner, that the Judge in dealing with the alleged offence should not proceed otherwise than with great caution and deliberation, and that when any antecedent process has to be put in motion, every prescribed step and rule (however technical) should be carefully taken, observed, and insisted upon (*In re Ramsay*, L. R. 3 P. C. 427).

Contempt is an exceptional offence, and should be cautiously dealt with, and all rules of practice carefully observed in dealing with it.

The policy of permitting Judges to determine (except in cases of open and undoubted insult to their persons or authority while actually engaged in administering justice) what is or what is not a contempt of their own dignity or power has been, and may still be, with wisdom doubted. In a note on *Rex v. Almon* (Wilm. Notes, p. 243), referred to in Campbell's "Lives of the

Policy of Judges determining in their own cases what is or is not a contempt.

Chief Justices" (vol. ii. Article on Sir E. Wilmot), it is stated that although the power to proceed by attachment in the case of a libel published on the Judges is undoubted, yet "the preferable course is to proceed by information or indictment so as to avoid placing them in the invidious situation of deciding where they may be supposed to be parties." At any rate, the jurisdiction ought to be most deliberately and carefully exercised, and then only in extreme cases and where absolutely necessary. Sir George Jessel, M. R., in dealing with an alleged contempt, said, "It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges, to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a Judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights—that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction" (see *In re Clements*, 46 L. J. Ch. at p. 385. See also *per Mathew, J.*, in *In re Davies*, 21 Q. B. D. at p. 239).

Dicta of
Jessel,
M.R., on
the sub-
ject.

Dicta of
Cotton,
L.J., as to

In dealing with an application to commit the publisher of a newspaper for having published some observations.

on a case while the trial was pending, which were not exercising the power to commit for contempt except in serious cases. alleged to tend to prejudice the minds of the public against one of the defendants before the hearing, Cotton, L. J., said, "In my opinion, no application to commit for contempt ought to be made *unless the offence was of so serious a nature as to render the exercise of this summary jurisdiction necessary to prevent interference with the course of justice*; and though there is here technically a contempt, I cannot see any such fear of serious interference with the course of justice or prejudice to the defendant as to justify the Court in interfering by this summary and arbitrary process" (see *Hunt v. Clarke*, 37 W. R. at p. 725). The Court of Appeal (although holding in this case that there had been a technical contempt) refused a motion to commit upon the ground that such an extreme course as moving to commit ought not under the circumstances to have been taken. (See also *Vernon v. Vernon*, 40 L. J. Ch. 118. And the observations of Lord Coleridge, C.J., on this subject *In re the "Evening News and Post*;" the "*Times*," 9th December, 1892.)

Upon the question of the privileges of the Judges Dicta of Willes, J., as to not hesitating to exercise the jurisdiction where necessary. in matters of contempt, Willes, J., made the following observations: "We have been urged to be careful of being misled by our own way of thinking, in the decision of this case, because, as it was suggested, our privileges are involved in the question. As that course has been adopted, I take leave to say that I am not conscious of the vulgar desire to elevate myself, or the Court of which I may be a member, by grasping after a pre-eminence which does not belong to me; and that I will endeavour to be even valiant in preserving and handing down those powers to do justice and to

maintain truth, which, for the common good, the law has intrusted to the Judges" (*Ex parte Fernandez*, 10 C. B., N. S., at pp. 56-7).

General
rule to be
observed in
exercising
the juris-
diction.

It would appear, therefore, that this peculiar jurisdiction of the Courts and Judges is to be exercised with caution, after carefully observing all the rules of practice applicable to it, and only in serious (as opposed to mere technical) cases of contempt; but that, when necessary, there ought to be no hesitation in exercising the jurisdiction.

CHAPTER II.

CONTEMPTS DIRECT.

For convenience contempt of Court will be considered under three heads: (1) Contempts direct; (2) Contempts indirect; and (3) Special or particular contempts.

Contempt
considered
under
three
heads.

Direct contempt is more or less spontaneous and aggressive on the part of the offender, and does not fall within the class of cases where the offence is constituted by disobedience to, or neglect of some express direction of the Court. It is aimed either expressly against the dignity or authority of the Court itself in the persons of its Judges or officers in such a manner as to amount to actual or constructive insult or resistance, or by acts tending to obstruct the course of justice. This contempt may be committed either by acts in the face of or within the precincts of the Court (*sedente curiâ*), or by acts done away from the Court.

(1) Direct
contempt.

Of contempts committed in the face of the Court the most gross are those which involve actual or threatened violence to the person of the presiding Judge, or the officers of the Court in attendance. An early instance of an offence of this nature is furnished in the well-known story of the behaviour of Henry V. (when Prince of Wales) to Gascoigne, C.J. No authentic report of this incident exists, but it was referred to by Lord Selborne

Violence to
Judge or
officer of
Court.

Henry
Prince of
Wales
committed
for con-
tempt, and
submits
ultimately

to the jurisdiction of the Court. as an authority in *Watt v. Ligertwood* (L. R. 2 H. L. (Sc.) n. (1), at p. 367), and is related in Campbell's "Lives of the Chief Justices" (vol. i., p. 127), in the words of Sir Thomas Elyot, as follows:—"The moste renouned prince King Henry the fyft, late Kynge of Englande, durynge the lyfe of his father, was noted to be fiere and of wanton courage: it hapned that one of his servantes, whom he fauoured well, was, for felony by him committed, arraigned at the Kynge's benche; whereof the prince being advertised and incensed by lyghte persones aboute him, in furious rage came hastily to the barre where his servante stode as a prisoner, and commanded him to be ungyved and set at libertie: whereat all men were abashed, reserved the Chief Justice, who humbly exhorted the prince to be contented, that his servante mought be ordered, accordynge to the aunciente lawes of this realm: or if he wolde have hym saved from the rigour of the lawes, that he shulde obteyne, if he moughte, of the Kynge his father, his gracious pardon, whereby no lawe or justyce shudde be derogate. With whiche answer the prince, nothyng appeased, but rather more inflamed, endeavored hym selfe to take away his servante. The iuge considering the perillous example and inconvenience that mought therby ensue, with a valyant spirite and courage, commanded the prince upon his alegeance, to leave the prisoner, and depart his way. With which commandment the prince being set all in a fury, all chafed, and in a terrible way, came up to the place of judgment, men thynking he wold have slayne the iuge, or have done to hym some damage: but the iuge sittynge styll without moving, declaring the majestie of the Kynge's place of jugement, and with an assured and

bolde countenaunce, had to the prince these wordes followynge:—

“ ‘Syr, remember yourselfe, I kepe here the place of the Kynge your souveraine lorde and father, to whom ye owe double obedience: wherefore eftsoones in his name, I charge you desyste of your wylfulness and vnlawfull enterprise and from hensforth give good example to those, whyche hereafter shall be your propre subjectes. *And now, for your contempte and disobedience, go you to the prysone of the Kynge's benche, whereunto I commytte you, and remayne ye there prysoner vntyll the pleasure of the Kynge your father be further knowen.*

“ With whiche wordes being abashed, and also wondrynge at the mervaylous gravitie of that worshypfulle iustyce, the noble prince layinge his weapon aparte, doying reverence, departed, and wente to the Kynge's benche as he was commanded. Wherat his servauntes disdaynyng, came and shewed to the Kynge all the hole affaire. Whereat he awhyles studyenge, after as a man all ravyshed with gladnes, holdynge his eien and handes up towarde heven, abraided, saying with a loude voice, ‘O merciful God, howe moche am I, above all other men, bounde to your infinite goodnes, specially for that ye have gyven me a iuge, who feareth not to minister iustyce, and also a sonne, who can suffre semblably, and obeye iustyce.’ ”

A modern example of violence to a Judge was afforded in the outrage committed upon Malins, V.C., on the 16th March, 1877, by a man (stated to have been an American), who threw an egg at the learned Judge, while leaving the Bench in his Court in Lincoln's Inn, for which offence the offender was forthwith committed

Outrage on
Malins,
V.C.

by the Judge to prison: *In re Cosgrave* (Seton, 5th ed., 406; the "*Times*," 17th March, 1877). It is said that the learned Judge had the presence of mind to remark pleasantly at the time that the *egg* must have been intended for his brother *Bacon*—referring to the Vice-Chancellor of that name then sitting in an adjoining Court. In August, 1877, the culprit was discharged from custody on his being placed on board a ship bound for New York.

Outrages
on Judges.

Outrages on Judges are very uncommon in the course of civil proceedings, but are perhaps more common in the course of trials for crime, when prisoners sometimes after conviction and sentence, and before removal, assault, or endeavour to assault the presiding Judge by flinging some missile at him, for which of course they may be at once punished for contempt, in addition to the sentence upon conviction. At Salisbury Summer

Assault on
Richard-
son, C.J.

Assizes, 1631, before Richardson, C.J., a prisoner after his condemnation for felony threw a brickbat at the Chief Justice which *narrowly missed*; for this an indictment was immediately drawn by Noy against the prisoner, *and his right hand was cut off and fixed to the gibbet*, upon which he was also immediately hanged in the presence of the Court (2 Dyer, 188*b*, notes).

William-
son's case.

One James Williamson, a felon convicted at the sessions held at Chester in October, 9 Car. 1, threw a stone at the Judges on the Bench, for which he was at once indicted, convicted, and had judgment *to have his right hand cut off*—which judgment was executed accordingly in open Court; and the hand was fixed over the entrance gate of Chester Castle, where it remained some years (Chester Docket Book, 1603-52, fo. 166).

Striking

For striking in the King's palace the common form

of punishment was to have "*the right hand stricken off*." in King's Palace.
The provisions of the Stat. 33, Hen. 8, cap. 12, for the infliction of this punishment are reproduced (for the information of the antiquarian and the modern surgeon) in Appendix C.

One Oldfield stabbed a Justice of Peace, *before he came into Westminster Hall*, of which he died; held he shall not have his right hand cut off. The striking to cause the loss of the hand ought to be in Westminster Hall, *sedentibus curiis* (Oldfield's Case, Trin. 8 Jac. 1, 6 Coke Rep. 292, Part xii. 71). And one Bellingham, in the Hall of Westminster, *sedentibus curiis*, with his elbow and shoulder out of malice "justled" Anthony Dyer of the Inner Temple, so that he overthrew him and with his feet spurned him upon the legs, but did not smite him neither with his hands nor with any weapon; and yet it was held that his right hand should be cut off, &c.; upon which Bellingham was indicted in *Banco Regis*; but after obtained his pardon. (Bellingham's Case, 2 Jac. 1, *ibid.*) Oldfield and Bellingham's cases.

Legal records are deficient in the reports of cases of outrages on Judges, which would indeed involve little more than a recital of facts, since the jurisdiction of the Courts to punish for such outrages does not appear to have been ever doubted. Few reported cases of outrages on Judges.

The House of Lords determined in *Watt v. Ligertwood* (L. R. 2 H. L. (Sc.) 361), that when a Judge in the legitimate exercise of his jurisdiction is defiantly disobeyed he may commit the offender instantly to prison for contempt of Court. In that case a Scotch advocate carried away (and subsequently destroyed) a document *in manibus curiæ* regardless of the Judge's remonstrances, and it was held by the House of Lords that it would have been competent for the Judge to proceed at once, Committal for disobedience to a Judge.

with the cognizance he had of the subject, and to vindicate the dignity of the Court, *by ordering the offender to be committed without more*, leaving him to purge his contempt in the usual way.

Contempt
in destroy-
ing a
document
produced
to a party
under an
order of
Court.

In a probate action relating to the testamentary dispositions of the late Duke of Sutherland, an order was made that certain papers in one of the late Duke's residences should be taken possession of by the administrator *pendente lite* appointed in the action, and opened by him in the presence of the late Duke's widow (the Dowager Duchess) and the Solicitors to the parties. Upon the production of the papers under this order the Dowager Duchess in the presence of the Solicitors, and before she could be stopped from doing it, took a paper from a bundle and placed it on a fire burning in the room, and so it was consumed. There was no copy of the document thus destroyed. Her grace was adjudged by the President of the Probate Division (Sir F. Jeune) to have been guilty of a grave contempt of Court, and was ordered to pay a fine of £250, and further to be imprisoned for six weeks, and also to pay the costs of the motion to commit (*Sutherland v. Sutherland*, the "*Times*," 19th March, 1898). The Dowager Duchess suffered the whole imprisonment. This case made a great sensation—it was stated at the time that not since the case of the once notorious Dowager Duchess of Kingston, who in 1776 was committed to prison for alleged bigamy (Howell's State Trials, vol. xx., p. 355), had a British Duchess been imprisoned for an offence against the law.

Punish-
ment for
that
offence.

Assaults on
Judges
when not
exercising

An attack upon a Judge while not engaged in or exercising judicial functions is properly punishable, not as a contempt, but (as in an ordinary case) by indict-

ment for an assault, etc. This course was pursued when the late Sir George Jessel, M.R., was assaulted in February, 1878, by having a pistol presented and fired at him (happily without effect) at the entrance to his Court in the Rolls House by a disappointed litigant; the culprit was tried for the offence, but acquitted on the ground of insanity and ordered to be detained during Her Majesty's pleasure; *In re Dodwell* (noted, Seton 5th ed., p. 406; the "*Times*," 16th March, 1878). A disappointed litigant in the County Court, in November, 1889, at Nottingham Railway Station, shot His Honour, Judge Bristowe, and so seriously wounded him that he narrowly escaped with his life. The culprit was subsequently tried at the Assizes before Pollock, B., and being convicted was sentenced to twenty years' penal servitude (the "*Times*," 10th March, 1890). To strike a Judge when taking his "walks abroad" does not amount to a contempt of Court (Wilm. Notes, p. 265).

Criticisms generally on the conduct of a Judge not calculated to obstruct or interfere with the course of justice, or the due administration of the law in any particular case (although libellous), do not constitute a contempt of Court (*In re a special Reference from the Bahama Islands* [1893], A. C. 138).

It is treason to kill the Chancellor, Treasurer, or the King's justices of the one bench or the other, justices in Eyre, or justices in Assize, "being in their places doing their offices" (25 Edw. 3, ch. 5). But Barons of the Exchequer as such are not within the protection of this Act (1 Hale, P.C., 231).

If a Judge is assaulted, libelled, or abused *within what may be fairly called the precincts of his Court*, or any-

judicial
functions
dealt with
as ordinary
offences.

Criticisms
on Judges
not calcu-
lated to
interfere
with
justice
not a
contempt.

Treason to
kill certain
Judges in
their
places.

Assault on
Judge
within the

precincts of the Court. where in connection with a case he is called upon to determine, it is an undoubted contempt.

Private communications with Judge a contempt. It is also a grave contempt of Court to communicate with, or to seek in any way to influence a Judge upon the subject of any matter he has to determine (*per* Lord Cottenham in *In re Sombre*, 1 McN. & G. 116). A person who wrote a letter to the Lord Chancellor relating to a threatened suit, and enclosing a bank note, was held guilty of a contempt and ordered to attend personally and shew cause why he should not be committed, but afterwards on his appearing and expressing contrition he was discharged on payment of costs (*Martin's Case*, 2 R. & M. 674).

Striking in lobby a contempt. To strike one of the parties in the lobby of the Court is a contempt: *Rex v. Wigley* (7 Car. & P. 4).

"Implying false play" to a Judge. There is old authority for saying that "implying false play" to the Judges is a contempt, namely, the case of *Robert Honel* (Lib. Ass. 19 Edw. 3, 61-5). In that case Robert sued by petition to the King setting forth that an assize in the King's Bench had, contrary to law, been decided against him, and that each of the Justices had decided it against the common assent of his companions. It appeared (upon inquiry directed) that the award had been made by the advice of all the Judges of assize; and the King being advised that the suit made to him by the petition "was made to the slander of the Court, thus implying false play on the Judges' part, Robert was ordered away in custody, to answer to the King."

To charge Judges with injustice is a contempt. To charge a Judge with injustice is a grievous contempt (*Hawk. Pleas of Crown*, 8th ed., p. 4), and to accuse him of corruption might be a worse insult; but a charge of injustice is as gross an insult as can be imagined short of that (*per* Cave, J., in *Reg. v. Jordan*,

36 W. R. at p. 590). The arraignment of the justice of the Judges is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of his people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them (*Rex v. Almon*, Wilm. Notes at p. 255).

As to contempts in libelling Courts or Judges, see 8 State Tr. 49-50; *Rex v. Almon*, Wilm. Notes, 248. Libels on Judges and Courts punished as contempt. The principle upon which attachments issue for libels upon Courts is "to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public. A libel upon a Court is a reflection upon the King, and telling the people that the administration of justice is in weak or corrupt hands, that the fountain of justice itself is tainted, and consequently that judgments which stream out of that fountain must be impure and contaminated" (*Rex v. Almon*, Wilm. Notes, p. 270). A libel upon a Judge in his judicial capacity is a contempt, whether it concerns what he did in Court, or what he did judicially out of it (*Rex v. Almon*, Wilm. Notes, p. 248; *In re Wallace*, L. R. 1 P. C. 283; *In re McDermott*, *ibid.*, 260; *s.c.* L. R. 2 P. C. 341); but a libel is not a contempt if not written of the Judge in his judicial capacity (*In re a Special Reference from the Bahama Islands* [1893], A. C. 138).

Libels on persons who being concerned in the business of the Courts are under its protection will be punished Libels on officers of Court also punished. sometimes as contempts (*Ex parte Jones*, 13 Ves. 237; *Price v. Hutchinson*, L. R. 9 Eq. 534; *Helmores v. Smith*, 35 Ch. D. 449).

Insolence to the Judge by insulting words or conduct, Insolence

to Judge,
or com-
ments in
Court on
his de-
cision.

or any comments in open Court upon his decision, or interruption of his judgment, or even protests in "a most unbecoming tone," constitute contempts: *Carus Wilson's Case* (7 Q. B. 984), and *per Holt, C.J., in Reg. v. Langley* (2 Salk. 697, pl. 1), though not the mere expression of an intention to appeal against his judgment. But to observe of a Judge in the course of and in reference to his judgment "That is a most unjust remark," is an insult to the Court in whatever manner expressed, and if not withdrawn amounts to a contempt (*Reg. v. Jordan*, 36 W. R. 589).

Lord Erskine's
encounter
with Mr.
Justice
Buller.

In the case of the Dean of St. Asaph a discussion arose between Lord Erskine (when at the Bar) and Buller, J., about recording the word "only" as part of a verdict delivered by a jury; at length Erskine said, "I stand here as an advocate for a brother citizen, and I desire that the word '*only*' be recorded;" whereupon Buller, J., said, "Sit down, sir! remember your duty, or I shall be obliged to proceed in another manner"—to which Erskine retorted, "Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct" (Campbell's '*Lives of the Chancellors*,' vol. vi., p. 432). The Judge took no notice of this reply. Lord Campbell speaks of the conduct of Erskine as a "noble stand for the independence of the Bar." This instance was cited as an authority in *In re Pater* (33 L. J. Mag., C., at p. 146).

Defendant
in person
fined for
improperly
addressing
jury, and
vilifying
Judge.

A defendant was fined by the Judge for contempt in addressing the jury upon his trial in an improper manner, and introducing irrelevant matter, and the Court upheld the Judge's power to do so: *Rex v. Davison* (4 B. and Ald. 329). Moreover, a defendant in

person who without imputing injustice to the Judge vilifies him or in his presence utters blasphemies and reviles the Christian religion, is guilty of contempt (*Rex v. Davison*, *supra*).

All contemptuous words or writings concerning the Courts (2 Hawk. Pleas of Cr., 8th ed., 221), or words imputing "scorn, reproach, or diminution of the Court, its process, orders, officers, or ministers," will constitute contempts (Viner's Abr. tit. Contempt, 442). What words and writings constitute contempt.

It is very improper and a contempt for a solicitor to interfere with a witness under examination, as by showing him an original will to refresh his memory: *Wright v. Wilkin* (6 W. R. 648). It is a contempt to interfere in any way with a witness with a view of preventing a fair trial (*Lewis v. James*, 8 Times L. R. 527). Interfering with witnesses a contempt.

Disturbing the Court by applauding is a contempt. In *Rex v. Stone* (6 T. R. at p. 530) upon the jury acquitting, in a case of treason, "there was a great shout in Court," and a man named Thompson jumping up, calling out, and waving his hat in the middle of the Court, was taken into custody and fined £20. Upon the acquittal of the seven Bishops there was a great shouting in Court, but Lord Macaulay says public opinion was so strong that the Judges would not interfere to stop it. Lord Coleridge, C.J., sitting at the Leeds Assizes on 9th of August, 1898 (during the trial of a case of *Fox v. Wheatley*), directed to be singled out from a number of persons in the gallery of the Court, who were disturbing the Court by applauding, a youth named Thomas White, who was taking part in the noise, and who on being brought before the Chief Disturbing Court by applause, &c.
Applause on acquittal of seven Bishops not stopped. Modern case of punishment for applauding.

Justice was ordered by him to stand committed to gaol for 48 hours for contempt of Court in taking part in the disturbance, the learned Judge remarking, "no Court shall be disgraced whilst I sit in it." It was stated that at the end of the day's sitting the Chief Justice relented, and with a severe caution to the young man ordered his release from custody.

Riot or disturbance within or near the Court.

Making, or causing to be made any noise or disturbance within, or within the precincts of the Court, or creating any riot near to the Court, so that any trial or hearing is materially disturbed or hindered, is a contempt of Court.

Striking, &c., in or near the Court.

It is laid down by Blackstone (after discussing the offence of striking in a Royal Palace) that striking in the superior courts of justice, or at the assizes, is still more penal, since it involves the disturbance of public justice (Kerr's Blackstone, 4th ed., vol. iv., p. 111). So if within view of such tribunals a man strike a juror or any other "with weapon, hand, shoulder, or foot" he commits a grave contempt of Court (East's Pleas of the Crown, vol. i., p. 408); or, if he be guilty of violence to subordinate officers of the Court the offence will be regarded as a contempt and so punished (*Ex parte Burrows*, 8 Ves. 584; *Re Macleod*, 6 Jur. 461, 462). The punishment for striking litigants, witnesses, or jurors in Westminster Hall while the Courts were sitting was in old days punished very severely—*i.e.* by imprisonment (sometimes perpetual), the forfeiture of all goods (or a heavy fine), and the loss of the right hand (2 Dyer, 188*b*, notes). "Note, the law makes a great difference between a stroke or blow, in or before any of the said Courts of justice, where the King is representatively present, and the King's Court, where his royall

person resideth. For in the King's house (as hath been said) blood must be drawne, which needeth not in or before the Courts of justice, but a stroke only sufficeth. Again, the punishment is more severe in the one case, than in the other; such honour the law attributeth to Courts of justice, when the judges or justices are doing of that which to justice appertaineth; and the reason is, *Quia justitiâ firmatur solium*. But note that by the ancient laws of this realm striking only in the King's court was punished by death" (Coke 3 Inst. 140).

Making a riot in open Court, and riotously attempting to rescue out of the custody of the sheriff a prisoner, who, though acquitted, has not yet been formally discharged, is a gross contempt in *facie curiæ*, and was formerly regarded as an offence punishable with amputation of limbs (East's Pleas of the Crown, vol. i., p. 408; and *Rex v. Lord Thanet*, which is there cited. Viner's Abr. tit. Contempt, 443). "If any doe rescue a prisoner in or before any of the above said Courts committed by any of the aforesaid justices it is a great misprision for which he and the prisoner assenting to it shall forfeit their lands and goods and their bodies to perpetuall imprisonment, but shall not lose his hand because no stroke or blow was given" (Coke 3 Inst. 140).

Any conduct which is calculated to interfere with the proceedings by assaulting or intimidating litigants or witnesses within the precincts of the Court, or preventing or hindering, or endeavouring to prevent or hinder them in their access to the Court or otherwise, is a contempt. The power of the Courts to vindicate their authority in this respect either by committal or indictment was established in early times. This may be illustrated by referring to two cases which occurred

Rioting or rescue in Court a gross contempt.

Assaults on or interference with litigants, &c.

Ancient cases upon this subject.

temp. Edward III. It appears from Lib. Ass. 30 Edw. 3, 176, 14, that a bill of trespass was brought in the Common Bench complaining, that whereas the plaintiff was coming to the King's Bench to make his defence about certain land, defendant last term detained him with his title deeds; also defendant, coming with others to him on a certain day, month, year, and place in county Northumberland, assaulted, beat, and wounded him, also threatened his life and limb, and that thus he durst not approach (the Court) unless with a strong force to avoid such outrages; and he had "judgment for the bill." In the case of Adam Brabson and Emma his wife: *Brabson's Case* (Lib. Ass. 39 Edw. 3, 231), it appears that they had brought an assize of novel disseisin against R. and others, and that in riding towards the Court at Winchester before the gates of Winchester Castle, the said R. carried off Adam's wife with him, with her assent (and she disavowed the suit), and Adam wished to have taken his wife, but R. would not suffer it, but used violence to Adam and ravished the woman. And a bill was brought before the Justices by the King, against the said R., setting forth that whereas the said Adam was pursuing his business before the same Justices against the said R., he had by force and arms before the doors of the aforesaid Castle, caused an assault to be made on him, and that in the presence of the Justices in disturbance of the said suit, and by force and arms, had taken his wife from him and took away her virtue and chattels, her cloak and rings to the value of 41s., and had wronged and broken the peace and despite the King and Judges to the grievous damage of the said Adam. On which R. pleaded not guilty, and on trial was found guilty of

*Brabson's
Case, 39
Edw. 3.*

damage to the extent of 41s., and was entrusted to the officer of the Court in respect of the fine, and that which he had done against the King by an assault made in the presence of the Justices, and they referred it to the King to determine the fine in Council, since in a similar case in which one Richard de C. struck a juror at Westminster, who found a verdict against one of his friends, he was awarded by the entire Council *to lose his right hand*, to forfeit his land and chattels to the King, and the King presently gave the land to one of his servants, and of his clemency pardoned the loss of the hand. On the private action of Adam and his wife coming on, the wife said she did not wish to sue, and the consequence was a non-suit. This case is referred to in 5 Vin. Abr. 449, tit. *Contempt*, where it is stated that R. was committed to the ward of the Sheriff, and that of the fine and the rest of the punishment the Court would have advice of the Council of the King *if he should lose his hand or not*.

A juror will be protected from insult in the same way as a Judge. "There be many records for abusing of jurors" (Coke 8 Inst. 142). During a trial upon an indictment for larceny at Quarter Sessions, the foreman of the jury had interrupted the counsel for the prisoner with certain observations while examining witnesses, and the counsel subsequently, in addressing the jury, said: "I thank God that there is more than one jurymen to determine whether the prisoner stole the property with which he is charged, for if there were only one, and that one the foreman, from what has transpired to-day there is no doubt what the result would be." After the trial was ended the counsel was adjudged to have been guilty of contempt, and fined £20: *Ex parte Pater* (5 B. & S. 299).

Jurors are
protected
from
insult.

Threaten-
ing or
abusive
language.

It is now clearly established that the use of threatening or abusive language to any one engaged in any proceedings as party, witness, juror, or otherwise (*Partridge v. Partridge*, Tot. 102), or any conduct that creates a disturbance or interference, or is otherwise unseemly, (as talking boisterously, laughing, or applauding in or near to the Courts) will be treated as a contempt of Court: *Rex v. Stone*, 6 T. R. 527, 530 (Petersd. Ab. tit. "Contempt").

Seeking
revenge
against
judges, &c.

"There is a great misprision when any revenge is sought against a judge, justice, officer, juror, serjeant, counsellor, minister or clerk for that which they doe in discharge of their severall duties, offices and places concerning the administration of justice" (Coke 3 Inst. 141).

Litigants
in person.

Although considerable latitude has been allowed, especially in more recent times (*Shedden v. Patrick*, L. R. 1 H. L., Sc. p. 481, *et seq.*), to parties conducting their causes in person, in consequence of their ignorance of forms of procedure, this indulgence should not be extended to permit them to continue an improper course of conduct after warning from the Judge, nor to use unbecoming or abusive language: *Rex v. Davison* (4 B. & Ald., 329).

Latitude
allowed to
advocates.

To a certain extent also the same indulgence which is shewn to suitors in person is extended to advocates, though the latter are less excusable for infringing the rules of propriety. It is obviously, however, in the interests of justice that an advocate should be secured in the enjoyment of considerable independence and latitude in performing his duties. An over-subservient Bar would be one of the greatest misfortunes that could happen to the administration of justice in England.

A counsel or advocate may in the interest of his client cast reflections upon the conduct, character, or credit of the parties or witnesses, so long as his comments are pertinent to the matters in question, although they would outside a Court of Justice be actionable as slanderous: *Hodgson v. Scarlett* (1 B. & Ald. 282); *Flint v. Pike* (4 B. & C. 478); *Birch v. Walsh* (10 Ir. Eq. R. 98). This license, however, will not justify an advocate in using language which, apart from such criticisms, is personally insulting or generally scandalous: *Ex parte Pater* (5 B. & S. 299) and *Fuller's Case* (12 Co. 41). And in all ordinary matters an advocate must, like every one else, conform himself to the usages of the Court and the rulings of the Judge.

"In the case of one Redding, who was convicted of tampering with Bedloe, one of the King's witnesses, in the Popish plot, and endeavouring to make Bedloe deny what before he had affirmed concerning several great persons engaged in the plot; for which he was adjudged to pay £1000, to stand in the pillory, and to be imprisoned for a year; and this conviction being before Commissioners of oyer and terminer of which Sir Thomas Jones and Sir William Dolben, Judges of B. R., were two; he afterwards being set at liberty, came into B. R., with an information against all the Commissioners of oyer and terminer, and after having demanded the justice of the Court, he said that 'Sir Thomas Jones and Sir William Dolben, contrary to Magna Charta, the King's oath, and their oath, have ruined me;' for which words (a record being presently made of them) he was adjudged to be fined £500, and imprisoned until payment of it; to find surety for his good behaviour for seven years; and, being a barrister-

Punish-
ment of an
advocate
for con-
tempt in an
old case.

at-law, his gown by order of the Court was pulled over his ears by the Tipstaff." See 2 Bacon's Abridg. (7th ed., pp. 899-400).

Contempts
by lawyers
as suitors
not now
punished
profession-
ally.

It is now established that a contempt by a barrister as a suitor cannot be punished in his professional character (*In re Wallace*, L. R. 1 P. C. 283). Nor can an undertaking given by a solicitor as a suitor be enforced against him as an officer of the Court (*Farley v. Buckler*, the "*Times*," 30th Oct., 1893). The proper punishment for contempt by a barrister as a suitor is by fine or imprisonment, and not by disbarring or suspension from practice. Nor generally where a solicitor is in contempt, will an application to strike him off the roll for such contempt be entertained; the proper proceeding is to move for an attachment (*Ex parte Townley*, 3 Dowl. 39; *Ex parte Grant*, Ib. 320; *In re a Solicitor*, 36 L. T., N. S., 113); but in aggravated cases—as where a solicitor keeps out of the way and refuses to obey an order to refund money (*Anon*, 10 Jur. 198), or where he persistently refuses to answer the matters of an affidavit, or interrogatories (*In re Worman*, 32 L. J. Ex. 83, *In re Holmes*, 12 Jur. 657)—the Court will order the solicitor in default of compliance to be both attached and struck off the roll for his contempt.

Aggra-
vated case
of miscon-
duct by
Solicitors
can be
treated as
contempt.

License
permitted
to Advoca-
tes in the
conduct of
cases.

An advocate is at liberty when addressing the Court in regular course, to strongly combat and contest any adverse views of the Judge or Judges expressed on the case during its argument, and to object to and protest against any course which the Judge may take and which the advocate thinks irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them,

or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case.

Considerable latitude is sometimes permitted to Advocates in Scotland. A Scotch Advocate was arguing before a Court in Scotland, when one of the Judges, not liking his manner, said to him, "It seems to me, *Mr. Blank*, that you are endeavouring in every way to shew your contempt for the Court." "No," was the quick rejoinder; "I am endeavouring in every way to conceal it."

Retort of a Scotch Advocate accused of treating Court with contempt.

It is related that Curran once persisted in making *some observations* which the presiding Judge had described as improper. "A further repetition of such remarks will amount to a contempt," said the indignant Judge. "If you commit me I shall be the best thing you've committed for many a year," was Curran's retort.

Story of Curran.

It appears not to be generally known to the very junior Bar that it is improper and disrespectful to the Court for a barrister to appear in Court robed and at the same time arrayed in a white waistcoat, or in any coat or waistcoat not black in colour, or to wear any but a white tie beneath the bands, or to "sport" a button-hole flower. Bone or fancy buttons on the garments and coloured shirts or collars should be avoided. A learned Vice-Chancellor once refused to hear a youthful advocate arrayed in a spotless white waistcoat until that objectionable garment had been concealed from view by the pinning of his gown over it. There is little doubt that advocates thus unprofessionally attired cannot insist upon being heard if the Judge objects to their unprofessional

Proper dress of barristers in Court.

style of dress. "I always listen," (Byles, J., is reported to have said to the late Lord Coleridge, when at the Bar,) "with little pleasure to the arguments of a counsel whose legs are encased in *light grey trousers*." Sir Richard Bethell (when Attorney-General) once sent for a young barrister in order to remonstrate with him for having appeared in Court when robed in a hunt waist-coat with gilt buttons on it.

Profes-
sional
Costume.

Formerly barristers were very particular as to their professional costume—white ties (as well as bands), breeches, silk stockings and gloves being commonly worn. Gloves are now discarded, white ties are fast disappearing, and trousers (which should be of a dark colour) have long taken the place of black breeches and silk stockings, except for the full dress of lawyers holding rank.

Reading
news-
papers.
Good feel-
ing be-
tween
Bench and
Bar.

It is not respectful to the Court to read newspapers at the Bar in view of the Judge.

Lord
Jeffreys.

Good feeling nearly always exists between the Bench and the Bar; and when it is interrupted the reason for it may generally be found to exist on both sides. There is scarcely any instance upon record in the Superior Courts of a conflict between the Bench and the Bar becoming so acute as to lead to the committal of an advocate for contempt while conducting his client's cause. Even Chief Justice Jeffreys (who is said to have brow-beaten and sometimes threatened counsel) does not appear to have put in force the power of committal against counsel. And during the progress of the once celebrated *Reg. v. Castro, or Tichborne Case*, (which, in its hearing perhaps occupied the time of the Court for a longer period than any other trial on record, except that of Warren Hastings), although there were frequent

conflicts between the Bench and the advocate for the "Claimant," and several reminders to him by the Judges of the weapon with which the law armed them, the Court never went to the length of depriving the client of the services of his advocate. The natural disinclination of the Court to interfere with counsel in such a way as to take his services from his client, ought to form a strong reason for counsel not assuming too great a license.

Formerly, all pleadings in Chancery had to be signed by counsel as a guarantee that the case made by the pleadings was not a "mere fiction," *per* James, L.J., in *Great Australian Gold Mining Company v. Martin* (5 Ch. D. at p. 10). Formerly pleaders were not allowed to be too *cunning or subtle* in their pleadings; one Daniel Hill (of counsel) put in a long and insufficient demurrer to a Bill; Lord Chancellor Egerton (27 April, 1 Jac.) ordered that "neither Bill, Answer, Demurrer, nor any other Plea should from thenceforth be received under the hand of the said Hill" (Cary Rep. 38). Counsel signing pleading.

There is a case upon record of counsel and solicitor being dealt with for contempt of Court for signing and filing a bill of complaint in the Exchequer by one highwayman against another asking for an account on the footing of a partnership. The case is referred to by Lord Justice Lindley in his book on Partnership, 6th ed., p. 101, as follows: "*Everet v. Williams* (2 Pothier on 'Obligations by Evans,' p. 3, note, citing *Europ. Mag.*, 1787, vol. ii., p. 360), is said to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc., that the defendant Bill of complaint in Chancery by a highwayman for an account held a contempt by counsel and solicitor signing and filing it.

applied to him to become a partner, that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads, and at inns, taverns, ale-houses, markets and fairs; that the plaintiff and defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost all clear gain to them; that they went accordingly and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane and other things, to dispose of, which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, etc.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz., at Bagshot, Salisbury, Hampstead, and elsewhere to the amount of £2000 and upwards. The rest of the bill was in the ordinary form for a partnership account. The bill is said to have been dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined £50 a-piece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was

afterwards transported." This case was referred to by Bacon, V.C.: See *Ashhurst v. Mason* (L. R. 20 Eq., p. 280). The Vice-Chancellor said this was a "legendary case," but the reference to the record of the cause is given in the *Europ. Mag.* It seems therefore to be an authentic case.

In 1596 (37 Eliz.) a replication was filed in Chancery *extending to six score sheets*, whereas all the pertinent matter might have been contained in sixteen; and it appearing that one Richard Mylward (the Plaintiff's son) did "devise draw and engross the said replication," Lord Keeper Egerton ordered "that the Warden of the Fleet shall take the said Richard Mylward into his custody, and shall bring him into Westminster Hall on Saturday next about 10 of the clock in the forenoon, and then and there shall cut a hole in the myddest of the same engrossed Replication, which is delivered unto him for that purpose, and put the said Richard's head through the same hole, and so let the same Replication hang about his shoulders with the written side outward, and then, the same so hanging, shall lead the same Richard, bareheaded and barefaced, round about Westminster Hall whilst the Courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall, and then shall take him back again to the Fleet, and keep him prisoner until he shall have paid £10 to her Majesty for a fine, and 20 nobles to the defendant for his costs in respect of the aforesaid abuse, which fine and costs are now adjudged and imposed upon him by this Court for the abuse aforesaid." *Mylward v. Weldon* (Reg. Lib. A. 1596, fo. 672).

It is an obvious Contempt of Court to sign the name of counsel to any pleading without his authority or

Punish-
ment for
filing
prolix
pleading.

Contempt
to sign
counsel's

name without authority to a pleading. privity (*Fawcett v. Garford*, Trin. 29, George 3); and this should be still borne in mind, because, although the signature of counsel is no longer compulsory, pleadings in the High Court are in the great majority of cases settled and signed by counsel, and it is most improper even to alter them without his privity. A solicitor having inserted scandalous matter in an answer, and put counsel's name thereto without authority, was committed, and ordered to pay the costs of the scandal: *Bishop v. Willis* (5 Beav. p. 83 (e)).

Contempt in wilfully misleading Court by permitting false affidavits to be used. A counsel who had appeared in a case and connived at a fraud practised upon the Court, by knowingly permitting false affidavits to be used, was held by Kay, J., upon motion made against him in the cause, to have been guilty of contempt of Court in thereby obstructing the course of justice, and was ordered to stand committed until further order: *Linwood v. Andrews*. *In re Moore* (58 L. T., 612).

Contempts by witnesses. A witness is guilty of contempt in not appearing on his subpoena (*Wyatt v. Wingford*, 2 Ld. Raym. 1528). Walter Jeames made oath that he *hanged a subpoena on the door* of one Stacy Barry, widow; and that the defendant used to resort thither, as he heard reported before that time, who hath not appeared; therefore an attachment was awarded (*Jeames v. Morgan*, Cary 79, 18 & 19 Eliz.). A witness is also guilty of contempt in refusing to be sworn or take upon himself some corresponding obligation to speak the truth, or in declining to give evidence or to answer any question which the Judge holds to be relevant (*Barrow v. Humphreys*, 3 B. & Ald. 598; *Hennegal v. Evance*, 12 Ves. 201; *Ex parte Fernandez*, 10 C. B., N. S., 3; and see "Taylor on Evidence," 8th ed. 1265); or by prevaricating

in his evidence or remaining in Court (not being a party) after the witnesses have been ordered to withdraw (*Chandler v. Horne*, 2 Moody & Rob. 423). But he is generally not bound to attend at a trial, and may (if he appears) refuse to be sworn or give evidence, unless and until his proper and reasonable costs, charges, and expenses have been paid or tendered to him (5 Eliz. c. 9, made perpetual by 26 & 27 Vict. c. 125; *Fuller v. Prentice*, 1 H. Bl. 49; *Bowles v. Johnson*, 1 W. Bl. 36; *Hallett v. Mears*, 13 East. 15, n; *Brocas v. Lloyd*, 23 Beav. 129). And as to what are reasonable costs and charges see *Taylor*, p. 1246, s. 99, Daniell's Ch. Pr. 6th ed. 643, and cases there cited: *In re Working Men's Mutual Society* (21 Ch. D. 831). The discretion of the master as to what are the reasonable expenses of a witness will not be interfered with (*Rendell v. Grundy*, 43 W. R. 50). Illness is, on proper proof thereof, a sufficient excuse by a witness for non-attendance (*In re Jacobs*, 1 H. & W. 123; *Scholes v. Hilton*, 10 M. & W. 15).

An answer to a question cannot be compelled when it may tend to criminate the witness (*Reg. v. Garbett*, 1 Den. C. C. 236), or, the husband or wife of the witness (*Reg. v. All Saints', Worcester*, 6 M. & Sel. 200); though the Court will not be satisfied with the mere statement of the witness that the answer will have that effect, but will judge for itself from the circumstances of the case and the nature of the evidence required whether any danger may be reasonably apprehended from the witness being compelled to answer; and it is not for the witness but the Judge to determine whether the question is one which the witness is bound to answer (*Reg. v. Boyes*, 1 B. & S. 311; *Ex parte*

What questions a witness need not answer.

Reynolds, 20 Ch. D. 294; *Ex parte Fernandez*, 30 L. J. C. P. 321). A witness refusing to be examined, commits an offence for which, as being an offence in the face of the Court, he may be instantly apprehended and imprisoned at the discretion of the Judge without any further proof or examination (*per Willes, J.*, in *Ex parte Fernandez*, 10 C. B., N. S., p. 40). If the witness is an accounting party he may refuse to answer questions if he has not had sufficient notice of the points on which he is to be examined, though he cannot refuse to be sworn for that reason (*Meyrick v. James*, 46 L. J. Ch. 38).

Contempt
by jurors.

Jurors are guilty of contempt in not attending when summoned and called on their summonses; or in going away prematurely from the Court, although challenged (Viner's Ab. Tit. "Contempt"); or in separating or leaving the jury-box without leave, or in taking a bribe, or in obstinately refusing to find a verdict (though not of course for mere inability to agree), or in finding a verdict contrary to the direction of the Judge on a question of law, their discretion in matters of fact being, however, unimpeachable (*Bushells' Case*, Vaugh. 135); in "tossing up" for their verdict (*Langdell v. Sutton*, Barnes, 32); or in eating and drinking without the leave of the Court, and such like irregularities. It appears from *Lib. Ass.*, 241, 10 (40 Edw. 3), that a juror had delivered a verdict in a case of trespass and battery without the assent of one of his companions (who said he did not half agree to such a verdict), on which account the juror who had delivered the verdict was committed to the care of the marshal, and it was ordered by the presiding Judge that he pay a heavy fine to the King, and that the other ten jurors should also be fined since

Ancient
case of
juror de-
livering a
verdict
without
assent of
all his
com-
panions.

they had permitted their verdict to be delivered before they were agreed upon it, and, therefore, every one of them was fined half a mark.

A juror in a case of murder, upon the adjournment of the Court during the trial, separated from his fellows for half an hour to dispatch a letter; he was fined £50 for contempt, and the Judge (Kennedy, J.) discharged the jury and adjourned the trial (*Reg. v. Macrae*, the "*Times*," 19th November, 1892). At the Lewes Assizes, 9th February, 1894, before Cave, J., four men were indicted for night poaching; while the jury were considering their verdict one of them was seized with sickness and rushed out of Court before he could be stopped; Cave, J., fined this juror £20 for leaving the jury-box without leave, and retried the case (*Reg. v. Rhodes and Others*, the "*Times*," 12th February, 1894). It is difficult to conceive what would be done if a juror was so contumacious as to die in the box. It has been related that when Gould, J., had been two hours trying a case at York he noticed that but eleven jurymen remained in the box: "Please my Lord" (replied the foreman in answer to the Judge's natural inquiry), "the other has gone away about some business he had to do, but he has left his verdict with me."

In the Manchester Court of Record a juror who was about to be sworn, after some time conducting himself in an extraordinary manner, notwithstanding that the Judge tried to pacify him, at length exclaimed, "I want to know what the devil I am brought here for." This rude speech (it is stated) exhausted the patience of the Judge (Mr. West, Q.C.), who immediately ordered the offender to be taken into custody and locked up until

the first case had been decided by the Court—after which the offender was brought back, admonished by the Judge and discharged (see the "*Law Gazette*," vol. vii. p. 299).

Contempts
by pri-
soners
while on
their trial.

Prisoners being tried will be punished for contempts of Court committed by them during their trial. At the Hertfordshire Spring Assizes, 1875, two men, named Kent and Craddock, were indicted for passing counterfeit coin. Kent pleaded guilty, and the jury having found a verdict of "not guilty" in Craddock's case, the Judge (Denman, J.), who had noticed Craddock while in the dock make some observations to the other prisoner, inquired of the gaoler what had passed. Upon being told that Craddock had said to the other prisoner, "I will give it to you for this splitting on me," the Judge directed the gaoler to be sworn and to repeat on oath the words alleged to have been used by Craddock. This was done, and Craddock was at once sentenced to twelve months' imprisonment for his contempt of Court (see the "*Times*," 18th March, 1875). The course the Judge took in this case was somewhat adversely criticized at the time.

Contempt
by wit-
ness in not
answering
at criminal
trial.

A witness refusing to answer at the trial at the Assizes of a criminal information for bribery, was at once dealt with as in contempt, and fined and imprisoned (*Ex parte Fernandez*, 10 C. B., N. S., 9).

Prejudi-
cing pend-
ing
criminal
trial at
assizes.

Exhibiting in an assize town inflammatory publications respecting a criminal charge, about to be tried at the Assizes, was held by two Judges on circuit not to be a contempt they could interfere to stop by committing the exhibitor (*Rex v. Gilham*, 1 Moody & Malkin, 165). The authority of this case may, however, be doubted (*Reg. v. Armstrong*, the "*Times*," 9th May, 1893).

All officers of the Supreme Court (such as Masters, Registrars, and Chief Clerks) are entitled to claim the same privilege from insult and injury in the discharge of their duties as a Judge; and the proceedings before them must be conducted with the same order and decorum; and any grave offence will be punishable as for contempt committed before the Court itself (*Re Macleod*, 6 Jur. 461; *French v. French*, 1 Hog. 188; *Ex parte Burrows*, 8 Ves. 585). Protection
of sub-
ordinate
officers.

Most direct contempts are punishable, summarily and instantly by fine or commitment at the discretion of the Judge. In the case of an advocate, the further penalty of partial suspension from his privilege of practising as such may be inflicted, though an absolute suspension by disbarring or striking off the rolls would seem an excessive and improper penalty to impose (*Smith v. Justices of Sierra Leone*, 8 Moore P. C. Ca., 361). An advocate may also be ordered to resume his seat, or even to be removed from the Court, if he behaves irregularly. In the cases of such commitments as those now referred to, no warrant is necessary (*Carus Wilson's Case*, 7 Q. B. 984); nor need the cause of commitment be set out at length in any warrant (*Ex parte Fernandez*, 10 C. B., N. S., 3). Summary
punish-
ment
inflicted
for direct
contempts.

The question whether a contempt has been committed is for the sole decision of the Court (*Re Crawford*, 18 Q. B. 618). In all cases, therefore, of this nature, and more particularly where the Judge himself is the person against whom the offence is committed, it is most desirable that the Court or the Judge should act with great circumspection, inasmuch as the positions of Judge and party (contrary to the fundamental legal maxim—*Nemo debet esse iudex in sua propria causa*) are in such cases Contempt
a question
for the
Court.

united. It would seem, therefore, more advisable in all instances (except those of gross misconduct), that in order to avoid any possible suspicion of being actuated by overheated or intemperate motives, the Court should, instead of dealing summarily with the offence, give the offending party an opportunity of explaining or purging his contempt, especially as the offence is one of a criminal nature, and should, therefore, be distinctly and specifically charged against the offender before he is punished (*Ex parte Pater*, 5 B. & S. 299; and see *per Coleridge, J.*, in *In Re Macleod*, 6 Jur. 461; *per Jessel, M.R.*, in *Republic of Costa Rica v. Erlanger*, 36 L. T. 382; and *In re Pollard*, L. R. 2 P. C. 106).

Contempts
by Sheriff
or officer
of the
Court.

The Sheriff or officer responsible for the care of the Courts may be dealt with as for contempt upon neglecting their duties, and may be fined for having the Courts too hot or too cold, too light or too dark, or not properly ventilated or cleaned, or for not keeping silence or order in the Court, or for not affording the accommodation therein necessary for the due administration of justice. It is related that Cockburn, C.J., once at the Leicester Assizes, fined a policeman for making a noise by inconsiderately slamming the door of the Court. The Sheriff may also be fined for not receiving or treating the Judges of Assize with due ceremony, state, or respect, or for not attending upon them personally, or for usurping their office, as by addressing or thanking the Grand Jury, or otherwise interfering with the judicial business of the Assizes. The law gives to the Justices of Assize, during their circuits, the aid and control of the High Sheriff of each county (*per Willes, J.*, in *Ex parte Fernandez*, 10 C. B., N. S., p. 52). In fact the exercise of the power to fine or commit a Sheriff for alleged contempts

of this nature, depends very much upon the will or disposition of the particular Judge of Assize concerned; his powers in this respect appear to be unlimited, and are perhaps indefinite. Fines to the amount of £500 have been inflicted on Sheriffs for offences of this kind.

At the Winchester Winter Assizes, 1892, the presiding Judge fined the High Sheriff of Hants 500 *guineas* for not being in attendance, he having gone without leave on a visit to Africa in search of a warmer climate, and notwithstanding that the Under Sheriff was in attendance with the Sheriff's state carriage and usual retinue. The fine was imposed upon the ground that it was the duty of the Sheriff to attend in person "just as though "the Sovereign was there," and that it could "not be "left to the caprice of individuals to decide whether they "would attend or not" (*In re Sir Alfred Tichbourne*, the "*Times*," 7th Dec., 1892). Sir Henry Slingsby, of Scriven, Yorkshire, Knight, High Sheriff of the County of York 1611-12, being absent from the Summer Assizes in 1612, on account of a suit he was prosecuting in London for the restitution of certain offices of which he alleged he had been unlawfully deprived, is stated to have been fined £200 (a very large sum in those days) for such absence by the Judges (Althan, B., and Bromby, B.) of Assize. (See Burke's *Landed Gentry*, 7th ed., p. 1688.)

Sheriffs
fined for
not attend-
ing the
Assizes.
Sir Alfred
Tich-
bourne's
case.

Sir Henry
Slingsby's
case.

If a direct contempt is not punished on the spot, the proper course is to proceed upon notice for committal or attachment. Contempts committed before officers of the Court are punishable in the same manner by the Court to which the officer is attached.

Committal
or attach-
ment on
notice.

CHAPTER III.

CONTEMPTS DIRECT—*continued*.

Contempts
committed
out of
Court.

THE Court itself may also be insulted by conduct out of Court. Thus it is a direct contempt of Court to send libellous, scandalous, or threatening letters (*In re Charlton*, 2 Myl. & Cr. 316; *Macgill's Case*, 2 Fowl. Ex. Pr. 404; *In re Wallace*, L. R. 1 P. C. 283); or communications intended to influence the decision, or offering bribes (*Martin's Case*, 2 Russ. & Myl. 674; *Ex parte Jones*, 13 Ves. 237; *In re Sombre*, 1 Mac. & G. 116), to a Judge or officer of the Court; or to interfere without leave with a sale directed by the Court, the conduct of which has been given to another party (*Dean v. Wilson*, 10 Ch. D. 136); or to libel, by circular or otherwise, a business carried on by a receiver or manager (*Helmores v. Smith*, 35 Ch. D. 449); or to induce a receiver in bankruptcy not to interfere with the carrying on of business by the debtors (*Ex parte Hayward*, *In re Plant*, 45 L. T. 326); or to advertise the intended delivery of a sermon "with special reference to the trial in which "the town is deeply interested" (*Mackett v. Commissioners of Herne Bay*, 24 W. R. 845). The Queen's Bench Division in Ireland committed to prison for contempt a priest who from the altar addressed his congregation in a manner calculated to prejudice some pending proceedings (*In re South Meath Election Peti-*

Preaching
or deliver-
ing address
in church
calculated
to preju-
dice
pending
proceed-
ings.

tion, 30 L. R. Ir. 659). It is also a contempt to address public meetings on a pending trial (*Onslow & Whalley's Case*, L. R. 9 Q. B. 219); or pending a winding-up petition, to distribute among shareholders of the Company circulars referring to the petition (*In re London Flour Co.*, 16 W. R. 474; *Re Sir John Moore Gold Mining Co.*, 25 W. R. 900).

It is of course a contempt of Court to forge, alter, or imitate the process of the Court, or to deal with process not regularly issued from the offices of the Court. Thus in a modern case, it appears that on 10th June, 1874, the Court of Queen's Bench received a letter from Brett, J., who had been sitting at Chambers, reporting that, on a summons supported by a certain party in person, he (the learned Judge) had written—"No order, W. B. B.," and that the next day the summons had been returned to the office with the words "No order" erased; and that an order had been procured to be drawn up upon the faith of the summons so altered. The party concerned attended the Court pursuant to a rule to show cause, on 12th June, 1874, and though he protested he had not made the alteration, he was sentenced to six months' imprisonment "for a gross and outrageous contempt of the Court" (*In re Jacobs*, the "*Times*," 13th June, 1874).

The respect due to the Court itself is owing also to its process. Thus it is a contempt to use insolent or indecent expressions, or oaths, or other violent or profane language on being served with any process (*Witham v. Witham*, 3 Ch. Rep. 41; *Phillips v. Hedges*, Cooke's Rep. 132; *Rex v. Unitt*, 1 Str. 567, and see cases 8, State Tr. 49, 50). About Mich. 9 Car. a fine was imposed, and parties pilloried, imprisoned, and

Contempt
of the
process of
the Court.

Case of
tampering
with an
order of
the Court.

Treating
process of
Court with
disrespect
is a con-
tempt.

So also to
assault or
illtreat a
process-
server.

laid in irons for abusing a man for serving a subpoena in B. R. (*Barker v. Shepherd*, Tothill, 167). In *Phillips v. Hedges* (*supra*), the defendant on being served with process used these words, "G— d—— Lord Reeves and "the Court. I neither care for him or them." The Court made absolute a rule for an attachment against him. It is also a contempt to assault, illtreat, or threaten a process-server engaged in his duty (*Anon*, 3 Atk. 219, *Eliot v. Halmarack*, 1 Mer. 302, *Emery v. Bowen*, 5 L. J. Ch. 349; *Price v. Hutchinson*, L. R. 9 Eq. 534); or to prevent or impede the proper service of any process (*Clements v. Williams*, 2 Scott, 814; *Schlesinger v. Flersheim*, 2 D. & L. 737). In *Williams v. Johns*, 1 Mer. 303 (*d*), it appeared that in 1778 the defendant on being served with a subpoena *compelled the person serving it to eat the parchment and wax of the process*, and also beat and kicked him. The defendant was committed to the Fleet for his contempt. But merely tearing up a document *after it is served*, if due service is not thereby prevented, is not a contempt (*Myers v. Wills*, 4 Moore, 147; and see *Adams v. Hughes*, 1 Brod. & Bing. 24); nor mere rude behaviour, on being served (*Weeks v. Whiteley*, 1 Har. & W. 218). A husband who took by the throat and with foul epithets pushed out of the door and down the steps a person who came to serve his wife with a charging order in respect of certain securities, was ordered by the Divisional Court to be committed, notwithstanding that *Adams v. Hughes* (*supra*) was cited to show that an order of committal will not be granted for collaring and ejecting a process-server (*Whitworth v. Duncan*, the "*Times*," 14th January, 1893). In an *Anonymous Case* (1 Salk. 84) an attachment was granted at once against a party upon whom a rule of

Court was served, upon which occasion he uttered some vulgar expressions concerning it. It is a contempt to interfere with enforcing, or obedience to, the orders of the Court. This is illustrated by *De Herlington's Case*, Lib. Ass. 274, 29 (48 Edw. 3), where proceedings for contempt seem to have been taken for disturbing persons in obeying an order in Chancery.

It is a contempt of Court for any unqualified person to act as, or pretend to be, a counsel or a solicitor (*In re Hunt*, 8 Q. B. D. 187; *In re Simmons*, 15 Q. B. D. 348); or to act as a solicitor under cover of the name of a duly qualified solicitor (*In re Webber*, the "Times," 20th December, 1892). But where the offence is technical only payment of costs will suffice as punishment (*In re Hall*, the "Times," 12th May, 1893). A person acting as a solicitor and getting documents or money into his hands and not complying with an order for delivery and payment, is liable to summary attachment in the same way as if he was a solicitor (*In re Hulm and Lewis* [1892], 2 Q. B. 261). A County Court Judge has no jurisdiction to commit for contempt a person who has acted as a solicitor in an action in the County Court without being qualified (*Reg. v. Judge of Brompton County Court* [1893], 2 Q. B. 195).

Any conduct by which the course of justice is perverted, either by a party or a stranger, is a contempt (*Smith v. Bond*, 13 M. & W. 594); thus the use of threats by letter or otherwise, to a party while his suit is pending (*In re Mulock*, 10 Jur. N. S., 1188; *Rex v. Carroll*, 1 Wils. 75; *Smith v. Lakeman*, 2 Jur. N. S., 1202; *Sharland v. Sharland*, 1 Times L. R. 492; *Bromilow v. Phillips*, 40 W. R. 220), even if the threatening letter is marked "private" (*Kitcat v. Sharp*, 48 L. T.

Contempt to impede obeying Court's orders.

Unqualified person acting as counsel or solicitor.

Person improperly acting as solicitor liable to summary attachment.

Perverting the course of justice by threats, improper comments on a case, or other interference.

64); or abusing a party in letters to persons likely to be witnesses in the cause (*Wellby v. Still*, 66 L. T. 528) have been held contempts. The latter case was said to come within the dictum of Lord Hardwick that "*abusing parties who are concerned in cases here*" is a contempt of Court (2 Atkyns, at p. 471). In *Wellby v. Still*, the Contemnors refused at the bar to apologize, and sought to justify, and were ordered (although they had apologized in their affidavits) to be committed; but in the case of Dr. Barnardo, who published an abusive and defamatory article on his opponent in certain protracted litigation pending with regard to the religious education of a boy named Gossage, and who apologized for his offence when the motion to commit him was heard, he was only fined £25 (*Reg. v. Barnardo*, the "*Times*," 29th November, 1892).

Illustrations of contempt by interfering with, or intimidating parties, or their witnesses.

Obstructing a person engaged in proceedings as party or witness from attending the Court, or serving him with process while in Court (*Garibaldo v. Cagnoni*, 6 Mod. 90; *Rea v. Hall*, 2 Wm. Black, 1110; *Cole v. Hawkins*, 2 Str. 1094; *Cullin's Case*, Style 395); or preventing or impeding a witness being subpoenaed (*Schlesinger v. Flersheim*, 2 D. & L. 787, and *Clements v. Williams*, 2 Scott 814); or using threats or persuasion to influence the evidence of a witness, or even a person likely to be a witness (*Shaw v. Shaw*, 2 S. & T. 517); or dismissing or threatening to dismiss a witness from his employment because of his evidence (*Bowden v. The Universities Co-operative Ass.*, 25 Sol. Journ. 886, and 71 Law Times Journ. 373); or any conduct collusive or otherwise, or interference in any proceedings by which others are deprived of their rights (*Ex parte Hayward*, 45 L. T. 326; *McGregor v. Barrett*, 6 C. B.

262), have all been held to be contempts. But writing a private letter not intended to go further, or to have any effect upon threatened proceedings, was held by North, J., not to be a contempt (*In re Cornish Staff v. Gill*, 9 Times L. R. 196). Pending an action for infringing a trade-mark the plaintiffs are at liberty to warn the trade by circular, but to introduce discussion of the merits of the action is a contempt (*J. and P. Coats v. Chadwick* [1894], 1 Ch. 347).

Interfering with, or bribing, or talking to, or trying to influence or intimidate a juror during the hearing of a case, is also a contempt of Court. "Embracery is defined in general to be an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favour one side by gifts or promises, threats or persuasions, or by instructing them in the cause, or any other way, except by opening and enforcing the evidence by counsel at the trial, whether the jurors give any verdict or not, and whether the verdict be true or false." The offence is punishable by fine and imprisonment upon an indictment for disturbing the administration of justice, or on a summary application as a "contempt of the King's Courts" (4 Bac. Ab. 7th ed., pp. 598-9). A modern example of this sort of embracery occurred at the Central Criminal Court in October, 1890, when a man named Baker, in the course of the trial of *Reg. v. Boaler*, endeavoured "to get at" one of the jury. The Recorder (Sir Thomas Chambers) held that it was a clear contempt, but Baker was subsequently proceeded against by indictment for embracery. A person having been convicted by a jury, his brother shortly after the trial went to the residence of the foreman of the jury and accused him of having

Interfering with, and endeavouring to intimidate or influence the jury. "Embracery."

Modern example of embracery.

Contempt to challenge a jurymen to a combat.

bullied the jury and challenged him to mortal combat. It was held that this was a contempt of Court and also an indictable misdemeanour, and the offender was sentenced to a month's imprisonment and ordered to enter into recognizances himself in £100, and two sureties of £20 each to keep the peace for seven years (*Reg. v. Martin*, 5 Cox C. C. 356).

Circumstances not amounting to intimidation of a party to a suit.

It is a contempt to intimidate, or try to intimidate, a party or his solicitors from proceeding with a suit. But in a certain divorce case the petitioner (the husband) opened communications with a possible witness (a lady) in the case, and referred her to his solicitors; it was alleged that she subsequently demanded money from the petitioner, and threatened if he did not comply "to go to the other side." A motion to commit the lady for contempt of court "in endeavouring to intimidate the petitioner and his solicitors from proceeding with the suit" was dismissed with costs (*Cox v. Cox*, *Dybell and Butler*, the "*Times*," 18th July, 1898).

Publications, when a contempt.

Classification of such contempts.

1. Scandalizing the Court.

All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds—namely, those which (1) scandalize the Court; (2) abuse the parties concerned in causes there; or (3) prejudice mankind against persons before the cause is heard (*per* Lord Hardwicke, *Anon.* 2 Atk. 469). Under the first head fall libels on the integrity of the Court, its Judges, officers, or proceedings (*Ex parte Turner*, 3 Mont. D. & D. 523; *Van Sandau v. Turner*, 6 Q. B. 784; *Reg. v. Castro*, L. R. 9 Q. B. 219), under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it pends (*Tichborne v. Tichborne*, 22 L. T. 55).

For example, attacks on or abuse of a party, his witnesses or solicitor (*Little v. Thomson*, 2 Beav. 129; *Felkin v. Lord Herbert*, 12 W. R. 241; *Robson v. Dodds*, 17 W. R. 782; *In re Johnson*, 20 Q. B. D. 68); and comments on a cause, written and published, spoken or threatened while it pends, and prejudicing, or calculated to prejudice, any party, and particularly paragraphs in newspapers having that effect (*St. James's Evening Post*, 2 Atk. 469; the *Bristol Journal Case*, 2 Ves. Sen. 520; *Little v. Thomson*, *supra*; *Felkin v. Lord Herbert*, *supra*; *Daw v. Eley*, L. R. 7 Eq. 49; *Tichborne v. Mostyn*, L. R. 7 Eq. 55n; *Onslow and Whalley's Case*, L. R. 9 Q. B. 219; *Skipworth's Case*, *ib.* p. 230; *In re Cheltenham and Swansea Railway Company*, L. R. 8 Eq. 580; *Robson v. Dodds*, 17 W. R. 782; *Kitcat v. Sharp*, 48 L. T. 64; *Peters v. Bradlaugh*, 4 Times L. R. 414; *O'Shea v. O'Shea*, 15 P. D. 59; *In re Crown Bank*, 44 Ch. D. 649; *Ex parte Green*, 7 Times L. R. 411; *Jones v. Flower*, 11 Times L. R. 122, and *Yorkshire Provident Assurance Co. v. Gilbert*, *ib.* 143) constitute contempts. But it must be proved that the comments were made with knowledge of the pending cause (*Metropolitan Music Hall Company v. Lake*, 58 L. J. Ch. 513). The editor, printer, or publisher of newspapers, pamphlets, &c., are held liable for the comments. It is a graver offence for the parties themselves to comment on a pending cause than for strangers who have no interest in it to do so.

In a case where a defendant to an action for libel published during its pendency an article in his paper calculated to prejudice the fair trial, Wills, J., stated that there was a great and mischievous tendency to publish articles of that sort, and that if it went on "it

2. Abusing parties to the cause.

3. Pre-judicial comments by writings, speeches, &c.

Trial by newspaper not to be permitted.

"would lead to trial by newspapers instead of by the proper tribunals of the country" (*Birmingham Vinegar Brewery v. Henry*, 10 Times L. R. 586). An application for committal should not be made where the offence by the comments is only technical or trifling (*Vernon v. Vernon*, 40 L. J. Ch. 118; *Hunt v. Clarke*, 37 W. R. 724; *In re Pontefract Election Petition*, 9 Times L. R. 430).

In trifling cases application should not be made.

Printing and circulating briefs, pleadings, &c., a contempt.

Advertisements, &c., referring to case also a contempt.

Also publishing portion of affidavit not read.

Comments on pending election petition a contempt;

but Judge in chambers cannot commit for it.

Printing (even without comments) and circulating the brief, pleadings, petition, or evidence of one side only, is a contempt (*Capt. Perry's Case*, 2 Atk. 472; *Cann v. Cann*, 3 Hare, 333 (a); *Bowden v. Russell*, 46 L. J. Ch. 414; *Kitcat v. Sharp*, 48 L. T. 64); and accounts of a case by notices, advertisements, or circulars, which misrepresent, or present mere *ex parte* statements of the case, are a contempt (*Matthews v. Smith*, 3 Hare, 331; *Ilkley Board v. Lister*, 11 Times L. R. 176).

It is improper to publish, in reporting a case, a portion of an affidavit not read in Court, and reflecting on the character of one of the parties, although other parts of the affidavit were read or referred to (*Duncan v. Sparling*, 10 Times L. R. 353).

During the pendency of an election petition the proprietor of a newspaper published in his journal a series of articles calculated to interfere with the course of justice, and to prejudice the public mind against the petitioner, and to prevent witnesses affording him their evidence. It was held that the publications were a contempt of the Irish Court of Common Pleas; but that a Judge on the *rota* sitting in Chambers had not jurisdiction to commit for the offence (*Re Tyrone Election Petition: Carson's Case*, Ir. R. 7 C. L. 242). Newspapers published correspondence in which a sitting member (against whose return there was a petition)

stated that "artifices of a very discreditable kind are "being adopted in order to trump up a case," it was held that the publication did not in the circumstances amount to a contempt of Court (*In re Montgomery Election Petition*, 9 Times L. R. 93).

An application to commit the publisher for an insinuation in a newspaper made pending an election petition for which there was no foundation, to the effect that the petitioner's "not claiming the seat was "suspicious," was refused without costs (*In re Pontefract Election Petition*, 9 Times L. R. 480).

The manager of a limited company which disseminates or publishes news amounting to a contempt of Court, may be held responsible and punished for it (*Ex parte Green*, 7 Times L. R. 411; see also *O'Shea v. O'Shea*, 15 P. D. 59). Ignorance of the contents of it will not excuse the printer or publisher of a pamphlet which comments on pending proceedings (*Ex parte Jones*, 13 Ves. at p. 289; *In re American Exchange in Europe*, 58 L. J. Ch. 706).

Jurors may of course be considered more amenable than Judges to the influences of comments upon pending proceedings. Where a letter published in a Colonial newspaper contained criticisms on the conduct of the Chief Justice of the Colony of such a nature that it might have been made the subject of proceedings for libel, but was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, it was held by the Privy Council that the same did not constitute a contempt of Court (*In re a Special Reference from the Bahama Islands* [1898], A. C. 138). A Judge has no legal authority to require an editor of a newspaper alleged to have

Applica-
tion refused
without
costs.

Officers of
a company
liable for
its publi-
cations.

Ignorance
of contents
of publica-
tion no
excuse.

Jurors
more liable
to be influ-
enced by
comments
than
Judges.

A mere
personal
libel on a
Judge is no
contempt.

No autho-
rity to
compel

editor to
disclose
name of
author.

published what amounted to a contempt to give up either the name of the writer or the manuscript of what is complained of (*In re a Special Reference from the Bahama Islands, supra*).

When pro-
ceedings
are pend-
ing.

Proceedings are *pending* immediately the Writ is issued, and as long as any proceedings can be taken. But when the cause is dead or ended, comments may be made; and the fact that a new trial has been moved for makes no difference (*Metzler v. Gounod*, 30 L. T. N. S. 264; *Dallas v. Ledger*, 4 Times L. R. 432). After a case has ended, a publication with respect to it which was designedly incorrect and misleading was treated not as a case of contempt, but as one for which the remedy was libel (*Purcell v. McNamara* heard before Erskine, L.C., in Dec., 1806, and referred to in the "Life of Romilly," vol. ii. pp. 30-5).

After case
ended
comments
may be
made,

and also
before it is
begun.

It is not a contempt to comment on proceedings threatened but not actually commenced (*In re Cornish Staff v. Gill*, 9 Times L. R. 196). Where a husband had obtained a decree of judicial separation against his wife, and after such decree the wife molested him, Butt, J., held that he had no jurisdiction to attach her for contempt for such molestation (*Smith v. Smith*, 59 L. J. Prob. 15). Adverse criticisms upon the conduct of a Judge in a case finally disposed of amounting to a personal attack of a gross kind upon his judicial character might, it is conceived, be punished as a contempt of Court although the case was ended; but other comments, or mere reflections on the Judge or the jurors, parties or witnesses, when the case is ended do not, it is conceived, amount to contempts.

Case where
doubtful
whether

Where it was doubtful whether at the time an article was inserted by one of the parties to an action referring

thereto he knew that an action had been commenced, and was actually pending (although he knew it had been threatened) he was, on expressing regret, ordered only to pay the costs of a motion to commit (*Foster v. Newnes*, the "Times," 5th Feb., 1894). And see *In re Cornish Staff v. Gill* (9 Times L. R. 196). The pendency of an action for a libel in a pamphlet does not prevent the pamphlet being dealt with as a contempt (*Corkery v. Hickson*, Ir. R. 10 C. L. 174). known action pending. Remedy may be both for libel and contempt.

The defendants in an action for libel brought in respect of some paragraphs which appeared in their newspaper repeated after action brought in the newspaper substantially the same charges which constituted the alleged libel; it was held by the Divisional Court that it was a case to be dealt with by injunction and not as contempt (*Cronmire v. the Daily Bourse*, 9 Times L. R. 101). Repeating libel after action dealt with by injunction.

A barrister wrote a letter to a newspaper commenting on an application to the Court made against him which had been dismissed. The High Court of British Guiana committed him to prison for contempt. It was objected on his behalf on an application for leave to appeal that the Court had exceeded its jurisdiction, as it had never been held that criticism on a case which was over was a contempt of Court. The Privy Council, in giving leave to appeal, held that *prima facie* this objection was well founded (*In re De Souza*, the "Times," 3rd December, 1888. The appeal abated by reason of the subsequent death of the counsel concerned). Comments on proceedings when ended. Criticism on a concluded case not a contempt.

There is, of course, no objection to a fair and impartial report of proceedings at the hearing, or on any interlocutory application (*Buenos Ayres Gas Company v. Wilde*, 29 W. R. 48; *Kimber v. Press Assoc.*, 9 Times Fair report of proceedings.

Reports
of or
comments
on cases
heard in
camerâ.

L. R. 6; but see *Jones v. Flower*, 11 Times L. R. 122); nor presumably to an advertisement or announcement of the result of an interlocutory proceeding unaccompanied by comment. Nor is there any objection to the publication of the result of a case heard in *camerâ*, because every decree of the Court is public property (*per* Sir F. Jeune, in *Lawrence v. Ambery*, 91 L. T. Journ. 230). But anything purporting to be a report of or comments on proceedings in *camerâ* is a contempt (*In re Martindale* [1894], 3 Ch. 193).

Trifling
complaints
should
not be
made of
publica-
tions al-
leged to be
contempts.

Although newspapers must not make comments on cases which are pending, a litigant must not be too sensitive and thin-skinned on the subject, and the Court must not by granting the process for contempt too easily bring the process itself into contempt. There must be some real reason for it (*per* Coleridge, C.J., in *In re the "Evening News and Post,"* the "*Times*," 9th December, 1892; see also *Hunt v. Clarke*, 37 W. R. 724, and *Vernon v. Vernon*, 40 L. J. Ch. 118). In the case of *The Pontefract Election Petition* (9 Times L. R. at p. 431), Cave, J., is reported to have said, "Some of these applications on account of articles in newspapers 'supposed to be 'contempts of Court' have really tended 'to bring the doctrine itself into contempt.'" See also *Duncan v. Sparling*, 10 Times L. R. 353.

Advertise-
ments or
circulars
may be
treated as
contempts.

Advertisements or circulars with reference to the subject-matter of the suit calculated to prejudice it or any of the parties thereto (*Matthews v. Smith*, 3 Hare 331); or offering rewards for evidence generally (as tending to produce perjury) will be treated as contempts (*Pool v. Sacheverel*, 1 P. Wms. 675); and if necessary restrained by injunction (*Coats v. Chadwick* [1894], 1 Ch. 347). But an advertisement for documentary evidence

is not objectionable (*Plating Company v. Farquharson*, 17 Ch. D. 49, where the authority of *Pool v. Sacheverel* was questioned). But see *Brodribb v. Brodribb*, 11 P. D. 66, and *Butler v. Butler*, 18 P. D. 73; where advertisements and placards of a particular character referring to pending divorce proceedings were held to be contempts. And as to circulars, see *Coats v. Chadwick* (*supra*). But advertisements of an injunction being granted, and cautioning persons from purchasing goods of the defendant, on the ground that his disposal of them is thereby restrained, are not a contempt (*per* Lord Brougham in *Powis v. Hunter*, 2 L. J. N. S. Ch. 31; and see *Buenos Ayres Gas Company v. Wilde*, 42 L. T. N. S. 657). Two advertisements issued pending an action charging gross misconduct against the defendant were held to be unjustifiable and a contempt (*Republic of Paraguay v. Lynch*, W. N., 1872, p. 48). And an advertisement purporting to be for some *lost or stolen bonds* not issued *bonâ fide* for recovery of the bonds, but for the purpose of bringing pressure to bear on persons seeking by an action to make the advertiser liable for their loss, was held by North, J., to be a contempt, and the person who inserted it was ordered to pay the costs of the motion to commit him (*In re Cornish, Staff v. Gill*, 9 Times L. R. 196). Where the publication amounts to a mere warning to the trade against infringement or imitation the Court will not interfere (*per* Chitty, J., in *Coats v. Chadwick* [1894], 1 Ch. 347).

An advertisement by a plaintiff in an action for an alleged infringement of his patent, issued pending, but not referring to the action, cautioning the public against using the article in question, cannot be treated as a

Advertisements of injunctions cautioning persons thereon are not contempts;

but advertisements not *bonâ fide* are.

If a mere warning Court will not interfere.

Advertisement as to patented article not objectionable.

contempt of Court whether as being injurious to the defendant or otherwise (*Fenner v. Wilson*, the "*Times*," 8th June, 1898).

Solicitor
for a party
discussing
case in
newspaper.

But it has been held a contempt for a solicitor of one of the parties to discuss under an assumed name in a newspaper the merits of an invention in question in the cause (*Daw v. Eley*, L. R. 7 Eq. 49).

Injunction
against a
threatened
contempt.

The Court has power not only to punish for contempt, but to restrain by injunction threatened contempts (*Coleman v. West Hartlepool Railway*, 8 W. R. 734; *Mackett v. Commissioners of Herne Bay*, 24 W. R. 845; *Kitcat v. Sharp*, 31 W. R. 227). It is competent for the Court where a contempt is threatened or has been committed (and on an application to commit), to take the lenient course of granting an injunction instead of making an order for committal or sequestration (*Plimpton v. Spiller*, 4 Ch. D. 286; *Coats v. Chadwick* [1894], 1 Ch. 347). And the Court may restrain the publication in any form of its proceedings *pendente lite*; although it will not always do so (*Brook v. Evans*, 8 W. R. 688). But an abridged report, or a report day by day, of proceedings, if fair and accurate, will be allowed, and will be privileged in case of an action for libel being brought for it (*Lewis v. Levy*, E. B. & E. 537; *Macdougall v. Knight*, 17 Q. B. D. 636; 14 App. Ca. 494; *Macdougall v. Knight*, No. 2, 25 Q. B. D. 1).

Infants or
married
women
responsible
for con-
tempt.

Disability (other perhaps than obvious lunacy or tender infancy) is no answer to a contempt, and, therefore, persons under age or married women are responsible, and may be committed to prison for wilful contempts of Court committed by them, in the same way as other people may be punished for them.

One Court One Court cannot punish for the contempt of another

Court (*Re an Application in Contempt*, 2 Times L. R. 351); nor has a Judge of the Queen's Bench Division power to commit for a contempt in the Divorce Division (*Cook v. Cook*, 2 Times L. R. 10). cannot
punish for
contempt
of another.

An action will not lie against a Judge for a wrongful commitment in the exercise of his judicial duties, any more than for an erroneous judgment (*Hammond v. Howell*, 1 Mod. 184, 2 Mod. 218). But the Divisional Court refused to strike out as disclosing no cause of action a statement of claim in an action for malicious prosecution brought against certain Judges of the Supreme Court of Trinidad for having (as it was alleged) of their own motion, and without any evidence, caused the plaintiff to be prosecuted and committed to prison for an alleged contempt of the Supreme Court in forwarding to the Governor of the Colony for transmission to the Queen in Council a petition of appeal complaining of the oppressive conduct of the defendants as Judges (*Anderson v. Gorrie*, 36 Sol. Journ. 256). At the trial of this case before Lord Coleridge, C.J., the jury found as regards one of the defendants (Mr. Justice Cook) that "he had overstrained his judicial powers, "and had acted in the administration of justice oppressively and maliciously to the prejudice of the plaintiff "and to the perversion of justice." The jury assessed the damages at £500. Notwithstanding the verdict, Lord Coleridge ordered judgment to be entered for Cook. This judgment was on appeal affirmed by the Court of Appeal. Lord Esher, M.R., in delivering the judgment of the Court, said, "If a Judge acting within his "jurisdiction exercised that jurisdiction maliciously and "with some motive other than the desire to administer "justice, he committed a gross dereliction of duty." And No action
lies against
a Judge for
wrongly
commit-
ting in the
exercise of
his office.

The rule
applies
although
the act of
the Judge
is mali-
cious.

after saying that a Judge was liable to be removed from his office for such conduct, Lord Esher went on to say, "that the law clearly was that no action lay against a Judge of a superior Court for any act done or anything said in the performance of his office even though it was done or said maliciously for the purpose of gratifying ill-feeling" (*Anderson v. Gorrie*, 10 Times L. R. 660).

Liability of
Judges for
judicial
acts.

As to the protection from actions afforded to Judges and their liability for their judicial acts, see the cases collected in the notes to *Mostyn v. Fabrigas* (1 Smith's L. C. 7th ed., at p. 715).

CHAPTER IV.

SPECIAL OR PARTICULAR CONTEMPTS, AS BY DISREGARDING
INJUNCTIONS, OR INTERFERING WITH RECEIVERS OR
WARDS, ETC.

THERE are certain contempts (here for convenience called Special or particular contempts. "special, or particular contempts"), occasioned by dis- regarding injunctions, or interfering with wards, receivers, and other persons entitled to the protection, or acting under the authority of the Court. Any person against whom an injunction has been granted by the High Court is liable to be committed to prison for contempt, or to have a writ of attachment issued against him, and to be arrested thereunder for his contempt, if he disregards or commits any breach of the injunction, or instigates others to commit a breach. Breach of injunctions punished by commitment or attachment. "Holgate makes oath, he Old case on the subject. *left an injunction in the house* of the defendant, and that "the defendant, Elizabeth White, Thomas Crimore, and "Robert Watkins have disobeyed the same; therefore "an attachment is awarded against them" (*Holgate & Ux v. Grantham*, 19 Eliz. Cary. 82. See also *Bodnam v. Morgan*, and *Lower v. Crudge*, Cary. 144-5). A person Contempt to disregard an injunction. against whom an injunction has been awarded and dis- regards it, is liable to be dealt with for contempt what- ever the nature of the injunction may be, and whether it be mandatory or restraining in its form, and whether

Dissolving
ex parte
injunction. it be made *ex parte*, or upon hearing both sides, or be interim or perpetual. But if an *ex parte* injunction be got, either by misrepresentation or by suppressing material facts, it will be dissolved on that ground alone.

Sequestra-
tion to
enforce in-
junction. In the case of a corporation or of a peer, observance of the injunction or other order of the Court is enforced by sequestration (*Eyre v. Countess of Shaftesbury*, 2 P. Wm. at p. 109; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42). Sequestration is also issued against the estate of a person in default against whom process of contempt cannot issue by reason of his being out of the jurisdiction (*Re East of England Bank*, 2 Dr. & Sm. 284).

Order for
injunction
must be
implicitly
obeyed. An injunction must be implicitly observed, and every diligence must be exercised to obey it to the letter, and any proceedings resulting in a breach are tantamount to an actual breach (*Harding v. Tingey*, 12 W. R. 684; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42); and this, too, although it may have been erroneously or irregularly obtained, for so long as it exists, the order for an injunction must be implicitly obeyed, and it cannot be disregarded until discharged on a proper application for the purpose (*Woodward v. Lord Lincoln*, 3 Swanst. 626; *Fennings v. Humphrey*, 4 Beav. 1; *Chuck v. Cremer*, 2 Ph. 113; *Russell v. East Anglian Railway Co.*, 3 McN. & G., at p. 117). The disobedience of an order, even though improvidently made, is a contempt, for an order once made cannot be questioned or disputed by disobedience (*In re Battersby's Estate*, 81 L. R. Ir. 73); but where an injunction had been improperly issued, Lord Eldon made no order to commit, but merely ordered the defendants and solicitors to pay the costs occasioned by the breach of the injunction

and of the application to commit (*Partington v. Booth*, 3 Mer. 148).

As to the breach of an injunction by third parties, Breach by third parties. see *Smith-Barry v. Dawson*, 27 L. R. Ir. 558. A defendant whose servant has committed a breach of an injunction, but to whom personally no blame attaches, is liable to pay the costs of committal (*Rantzen v. Rothschild*, 14 W. R. 96).

In July, 1892, a person was restrained by injunction from "negotiating, pledging, or disposing of" certain bills of exchange payable to order. He had, prior to that date, deposited such bills with his solicitor to secure a debt, and in October, 1892 (while the injunction was in force), he, at the request of his solicitor, indorsed one of the bills. Both were held guilty of contempt in negotiating this bill contrary to the injunction, but as the case was not one of serious contempt, it was held that justice would be met by an order to pay costs only (*Day v. Longhurst*, 41 W. R. 288). Solicitor for party liable for contempt if privy to a breach of injunction.

An order irregularly obtained cannot be treated as a nullity, as it operates until by a proper application it is discharged (*Blake v. Blake*, 7 Beav. 514). "One delivered a copy of injunction to the defendant, and shewed him the writ under seal, but defendant desired to compare it with the original and see how far he was concerned in it, which being denied, defendant thereupon delivered back the copy but disturbed the plaintiff's possession. The server of the copy swore he showed it to the defendant under seal." Per Lord Keeper, it is a service sufficient to ground a contempt, and that notwithstanding it was irregularly issued it ought to be obeyed (*Woodward v. King*, 2 Chan. Ca. 208, Mich. 26 Car. 2). The person enjoined who does not Order irregularly obtained cannot be disregarded, but must be obeyed. Old case on subject.

If order
misleads
it may
afford
excuse for
breach.

obey the injunction to the letter while it exists, is guilty of contempt, unless there be something to mislead on the plain reading of the order (*Russell v. East Anglian Ry. Co.*, 3 McN. & G. 117). In the case of a corporation a sequestration was ordered to issue although it was alleged it was practically impossible to comply with the order, *Spokes v. Banbury Board of Health* (L. R. 1 Eq. 42). Ignorance of the contents of the order is no excuse where the party served with it does not read it himself, but relies on a mere statement of its effect by his solicitor (*In re Witten*, 4 Times L. R. 36).

Impossi-
bility to
comply.
Not read-
ing order
no excuse
for breach.

An under-
taking is
equivalent
to an in-
junction.

An undertaking entered into or given to the Court by a party or his counsel or solicitor is equivalent to and has the effect of an injunction so far as any infringement thereof may be made the subject of an application to the Court to punish for its breach (*Neath Canal Co. v. Ynisarwed*, *Resolven Coll. Co.*, L. R. 10 Ch. 450; *Lawford v. Spicer*, 2 Jur. N.S., 564; *Attorney General v. Boyle*, 10 Jur. N.S., 309). The undertaking to be enforced need not necessarily be embodied in an order.

Under-
taking by a
person not
a party to
the cause.

A wife living separate from her husband signed an undertaking on the trial of an action by which she undertook to abstain from in any way molesting her husband. She subsequently caused to be published a pamphlet reflecting on him. This was held to be both a breach of the undertaking and a contempt of Court (*Linton v. Mackenzie*, the "*Times*," 31st Oct., 1893). It is, however, submitted that there was no contempt of Court in this case, because the wife not being a party to the action, and the undertaking on her part not having been expressed to have been given to the Court, there was in fact no undertaking given by her to the Court. *An undertaking to be summarily enforced must be one given*

to the Court; and it is difficult to see how a mere bystander can give such an undertaking. See *Iveson v. Harris* (7 Ves. at p. 256).

There is jurisdiction to order any act ordered to be done, to be done by a deputy, in case the party ordered to do it refuses or neglects to perform the act. "If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a Judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or Judge, at the cost of the disobedient party; and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a Judge may direct, and execution may issue for the amount so ascertained and costs" (R. S. C., Ord. XLII., r. 30). This rule appears to have been founded upon the provisions of section 74 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

At the trial of an action for specific performance of an agreement to make a road, the defendant gave an undertaking that he would complete the road in question. An order was subsequently made fixing a date by which the road was to be completed. This not having been done, the plaintiff moved under the above rule for an order that he might be at liberty to complete the road himself at the cost of the defendant. North, J., held that the case did not fall within the rule; but that nevertheless the Court would enforce the undertaking by permitting the plaintiff to do the

Carrying
out order
by deputy.
R. S. C.,
1883,
O. XLII.,
r. 30.

Case of an
agreement
to make a
road.

works, with liberty to apply that the defendant should pay the expenses incurred in completing the road (*Mortimer v. Wilson*, 33 W. R. 927).

Judicature
Act, 1884,
s. 14.

By section 14 of the Judicature Act, 1884, it is provided that, "where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose, and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it."

Persons
appointed
to execute
deeds, &c.

In *In re Edwards, Owen v. Edwards* (33 W. R. 578), the Judge appointed under this section his Chief Clerk to execute a mortgage for a defendant who refused to obey an order on him to execute it; and in *Hoare v. Gray* (31 Sol. Journ. 744), and *Howarth v. Howarth* (11 P. D. 68), the Registrar was appointed to execute deeds for parties ordered to do so, and who would not sign them. The order may be made on a motion for attachment, *Howarth v. Howarth* (11 P. D. 95). In *In re Lumley* (W. N., 1893, p. 13), the official solicitor was appointed to execute an assignment.

Delivering
up of a
child.

Where a wife refused to deliver up, pursuant to order, a child to her husband, the Court appointed the "Serjeant-at-Arms" to take possession of the child and deliver it over according to the order (*G. v. L.* [1891], 3 Ch. 126).

Trying to stultify an order of the Court made upon an undertaking given, by getting a clause introduced into an Act of Parliament, is a contempt of Court (*Attorney General v. Manchester and Leeds Ry. Co.*, 3 Jur. 379).

Procuring Act to defeat order a contempt.

The breach of an injunction will not be punished unless the party alleged to be in contempt knew that the order had been made. But actual service of the order is not essential if it be shewn that he knew or might have known of the order (*United Telephone Co. v. Dale*, 25 Ch. D. 778). Notice of any injunction or of any undertaking will make the party liable for its breach from thenceforward (*Lower v. Crudge*, Cary. 144, 22 Eliz.).

Knowledge of order essential to liability for breach ; but actual service not essential.

Notice of it sufficient.

In the case of an injunction against partners, the partner or partners, privy to its breach, will be punished. In the case of an injunction against corporations, any director or officer of the corporation, privy to its breach will be punished for such breach ; or for any *wilful* breach by the corporation of the injunction (Ord. XLII., r. 81).

Injunctions against partners and corporations, who responsible for breach.

A person against whom an injunction has been granted is liable for the acts of others which he instigates in breach thereof ; and for any acts of his workmen, servants, or agents, to which he is, or may reasonably be taken to be, privy, in breach of the injunction ; and even where no personal blame attaches to him he is liable to pay the costs of an application to commit him for his servant's breach (*Rantzen v. Rothschild*, 14 W. R. 96). Any workman, servant, or agent of a person against whom an injunction has been awarded, is personally liable to be punished for any breach of the injunction committed by such workman, servant, or agent, after having knowledge thereof ; and it is conceived that

Liability for acts of agents, and liability of agents for breach.

this is so whether the order awarding the injunction does or does not in terms restrain "workmen, servants, or agents."

No excuse
that terms
of injunc-
tion not
understood
or misin-
terpreted.

If there has been in fact a breach of an order or injunction of the Court, it will be no answer for the party implicated in the breach to urge that the terms of the order or its effect were or was misapprehended, or that the order was misconstrued, but if an order be obscure in its terms and likely to create misconception, or there be something to mislead on its plain terms (*Russell v. East Anglian Ry. Co.*, 3 McN. & G., 104), there may be some excuse for a breach; and perhaps the severe course of moving to commit for the breach ought not in such a case to be resorted to. An injunction was granted to restrain the infringement of a patent for a machine—the defendants subsequently sent an infringing machine to Germany; it was held to be no excuse for their breach of the injunction that they had misinterpreted the order as not extending to "foreign parts" (*Lyon v. Goddard*, 11 Rep. Pat. Ca. 113).

Interfer-
ence with
receiver is
contempt;

Any interference without the leave of the Court by third parties with the possession of a receiver appointed by the High Court, or disturbance of that possession, is a contempt of Court, and that whether by any one claiming paramount to or under the right which the receiver was appointed to protect (*Kerr on Receivers*, 3rd ed., 139–141, and cases there cited; see also *Searle v. Choat*, 25 Ch. D. 723). Any such person is liable to be committed, and in extreme or aggravated cases will be so punished, although the Court is generally satisfied with ordering payment of the costs and expenses occasioned by the improper conduct (*Kerr*, pp. 151–2).

The same rule applies to a manager of a business

appointed by the High Court, and any one interfering with the business by libelling it or otherwise, may be punished by committal (*Helmores v. Smith* (2) 35 Ch. D. 449); but it is not a contempt for a late manager appointed by the Court of a business to engage, after he has been removed from his office, in the same kind of business, and to solicit the customers of the old business he managed (*In re Gent, Gent-Davis v. Harris*, 40 W. R. 267).

Interfering with or disturbing sequestrators in possession under a writ of sequestration is also a contempt of Court (*Angel v. Smith*, 9 Ves. 836), and sequestrators forcibly dispossessed will be restored by injunction (*Lord Pelham v. Duchess of Newcastle*, 3 Swan. 289 n.). As to what is not an interference with the possession of sequestrators, see *Sykes v. Dyson* (W. N., 1870, p. 81); see also *Lord Pelham v. Lord Harley* (3 Swan. 291 n.). Interference with a receiver appointed *pendente lite* is a contempt of Court; and thus to take from the possession of such a receiver and destroy a paper in his possession is a contempt (*Sutherland v. Sutherland*, the "*Times*," 19th March, 1898).

To interfere with the possession of an official liquidator is also a contempt of Court;—"the official liquidator is an officer of the Court; he is practically in the position of a receiver appointed by the Court, and it would be a contempt of Court for any one to interfere in any way with his possession without the leave of the Court" (*per Kay, J.*, in *In re Henry Pound, Son & Hutchins*, 42 Ch. D. at p. 411; and see *In re Joshua Stubbs, Limited* [1891], 1 Ch. 475); and by rule 90 of the Companies (Winding-up) Rules, 1890, it is provided that a liquidator "shall for the purpose of acquiring or retaining

possession of the property of the company, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may on his application enforce such acquisition or retention accordingly."

or with a receiver or trustee in bankruptcy;

It is also a contempt to interfere with the possession of a receiver or trustee appointed in bankruptcy; unless indeed it be the case of a landlord distraining for a year's rent (*Ex parte Cochrane*, L. R. 20 Eq. 282).

or with a sheriff after seizing.

It is also a contempt to forcibly interfere with the possession of a sheriff after he has seized under a writ of execution (*Cooper v. Asprey*, 32 L. J. Q. B. 209). Where by a stratagem the sheriff was got out of possession and a crowd subsequently wrecked part of the premises, the parties to getting the sheriff out were held guilty of contempt although they disclaimed all responsibility for the wrecking (*Lacon v. De Groat*, 10 Times L. R. 24). A writ of attachment was ordered to issue against a defendant who re-took possession after the sheriff had given it to the plaintiff (*In re Higgs, Goddard v. Higgs*, W. N., 1894, p. 73).

It is a contempt to refuse police protection to a sheriff.

An inspector of police, who refused to allow police protection to the sheriff for the purpose of enabling him to execute at night certain writs of the High Court, was held by the Queen's Bench Division in Ireland to be guilty of contempt of Court; for the sheriff in his sole discretion has the right to require the protection and assistance of the constabulary as part of the power of the county in the execution of writs of execution of the Superior Courts, whether by night or day, and a refusal to give that protection and assistance will be punished as a contempt of the Court whence the writ issued (*Att. Gen. v. Kissane*, 32 L. R. Ir. 220); see also

Miller v. Knox, 4 Bing. N. C. 574, where constables who refused to assist persons, named as commissioners in a writ of rebellion, were held liable to be attached for such refusal. The Queen's writs and the judgments of Her Courts cannot be permitted to become abortive.

It is conceived that it would also be a contempt of Court to disturb the committee of the person or estate of a lunatic so found while the committee is giving effect to the orders of the Court, or to interfere in any way with the estate of the lunatic, or with the committee's possession thereof. Contempt to disturb committee of lunatic;

It is a contempt to publish comments on proceedings in lunacy, or to reflect on the conduct of those to whom the management of the lunatic's affairs is committed or to comment on lunacy proceedings. (*Ex parte Jones*, 13 Ves. 237, *Re Sombre*, 1 M. & G. 116, and *Roach v. Garvan*, 2 Dick. 794).

It is a contempt for an alleged lunatic to wilfully disobey an order to submit to medical examination, and such contempt is punishable by attachment (Re B. [1892], 1 Ch. 459; 40 W. R. 369), and an order for attachment may be made by a Master in Lunacy (Re B. *supra*). It is also a contempt for any one to interfere with the visitors in lunacy on their visiting a lunatic or supposed lunatic (*per James, L. J., In re an Alleged Lunatic*, 18 Ch. D. at p. 27). Contempt to disobey order for alleged lunatic's examination, or to interfere with visitors in lunacy.

It is also a contempt of Court to remove without leave a ward out of the jurisdiction of the Court, or without leave to marry a ward of Court, or to seduce or otherwise be guilty of misconduct towards a ward of Court, or in any way to interfere with a ward of Court. It is no answer where this offence is charged to allege that the party guilty of the acts complained of did not know that the infant in question was a ward. Contempts as to wards of Court. No defence that not known person was a ward.

Persons
aiding as
well as
principals
punished.

ward of Court (*Herbert's Case*, 3 P. Wms. 116, Trin. 1781); and the Court will punish for the contempt not only the parties principally concerned in the offence against the ward, but also any one aiding or abetting such offence. Encouraging an infant ward of the Court to go from his committees, under whose care the Court has placed him, is a contempt, 1 P. Wms. 697, Pasch. 1721 (cited as *Dr. Yalden's Case*). An infant was inveigled from her guardian (though he was not assigned by the Court), and married to W., yet both the said W., and the parson, and the agents were all committed by the Master of the Rolls, and the order was afterwards affirmed by Lord Harcourt (cited 2 P. Wms. 112, as *Hannes v. Waugh*, 12 Ann.). *The punishment for offences against wards is committal.*

Marriage
without
consent
immedi-
ately on
attaining
21 no con-
tempt.

A gentleman obtained leave of the Court to pay his addresses to a ward on an undertaking that he would abide by the directions of the Court. No directions were given or applied for; but *after the lady came of age* she made a settlement of her property, giving to herself and this gentleman a joint power of appointment in priority to the other trusts, and a marriage was arranged to take place between them without the consent of the Court. It was held by the Court of Appeal that the gentleman would not be committing a contempt of Court in marrying the lady, and that the Court had in the circumstances no jurisdiction to restrain the parties from marrying, or the lady from disposing of her property as she pleased (*Bolton v. Bolton* [1891], 3 Ch. 270).

Sergeant-
at-Arms
attending
Court
proper

Notwithstanding the alterations made by the Judicature Acts, there is such an officer as the "Sergeant-at-Arms attending the Court," and he is the proper

officer to execute orders for the custody, production, or delivery of the person of a ward of Court (*G. v. L.* [1891], 3 Ch. 126). In that case a husband had obtained an order on his wife to deliver one of their children to him, and upon her default in obeying the order he did not wish to apply to commit her.—Chitty, J., ordered the “Sergeant-at-Arms” attending the Court to take the infant into his custody, and deliver him to a lady appointed by the father to receive him.

officer to execute orders relating to wards.

As to the office of “Sergeant-at-Arms” attending the Court, see [1891], 3 Ch. note (1), at p. 127.

As to Sergeant-at-Arms.

As to interference with wards of Court, and for forms of injunctions, settlements of their property, and other orders relating thereto, see Seton on Decrees, 5th ed., pp. 894–907.

Forms of injunction and other orders as to wards.

Refusing to produce an alleged lunatic when ordered to do so by the Lord Chancellor, upon an inquiry as to his lunacy, was held by Parker, L.C., to be a contempt of Court for which the wife refusing (although an Irish peeress) was ordered to be committed (*Lord Wenman's Case*, 1 P. Wms. 701). But where an English peeress was guilty of contempt with regard to a ward of Court, she was not ordered to be committed, but her estate was ordered to be sequestered by way of punishment (*Eyre v. Countess of Shaftesbury*, 2 P. Wms. 108).

Peeress refusing to produce a lunatic committed.

Peeress in contempt regarding ward sequestration ordered.

A person who marries any one found lunatic by inquisition is guilty of contempt of Court, and is liable to be committed (*Mrs. Aske's Case*, Prec. in Chan. 208).

Marriage with lunatic a contempt.

It is a contempt of Court to rescue any person arrested or being arrested under an execution of the Court (*Blackwell v. Tatlow*, 2 My. & K. 321; *Jennings v. Simpson*, 2 Jur. 28); or to rescue any person out of the custody of a Sheriff or bailiff (*Gobly v. Dewes*, 10

Rescue a contempt.

Declining to assist sheriff a contempt. Bing. 112); or to decline to assist when called upon, any sheriff or other authorized officer when executing the order or process of the Court (*Miller v. Knox*, 4 Bing. N. C. 574; *Att. Gen. v. Kissane* 32 L. R. Ir. 220).

Default by officer of company in supplying statement of its affairs. Where an officer of a Company in liquidation neglects to obey an order directing him to make out, submit, and verify the statement of the Company's affairs required by sec. 7 of the Companies (Winding-up) Act, 1890, the best course is to seek to inflict a fine under sub-s. (5), rather than to apply to commit; an order for supplying such a statement should not be made on any officer unless it be shewn that he has the materials for doing so; and any application to enforce such an order should be made at Chambers (*In re Columbian Gold Mines*, 10 Times L. R. 478).

Contempt by pretending to be a creditor or contributory of company in liquidation. By sub-s. (6) of sect. 7 of the Companies Winding-up Act, 1890, it is enacted that "any person untruthfully stating himself to be a creditor or contributory, shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the liquidator or of the official receiver."

Trifling pleadings are a contempt. It is a contempt of Court to trifle with it by pleading a ridiculous plea. A defendant who was aged sixty-three, as a mere shift and for delay, to put off the trial, pleaded in an action of ejectment brought against him that he was an infant. An attachment was granted against him (*Lord v. Thornton*, 2 Bulstrode 67, Mich. 11 Jac.). And see Bacon's Ab. tit. Pleas (G.) 4. In *Mylward v. Weldon* (Reg. Lib. A. 1596, fol. 672) Lord Keeper Egerton punished as for contempt the author of a long and irrelevant replication; and in *Everett v. Williams* (temp. Geo. 1, 2 Pothier on "Obligations by Evans," p. 3, note), those responsible for a ridiculous

bill by one highwayman against another for an account of their plunder were punished for contempt. Lord Keeper Egerton once ordered that no further pleadings should be received under the hand of a certain counsel (one Daniel Hill) who was *too cunning and subtle* in pleading (Cary. Rep. 38).

It is also a contempt of Court to bring or take fictitious actions or proceedings. An action not to determine a right or controversy, but to deceive the Court and to raise a prejudice against a third person, is unlawful and punishable as a contempt (*per* Lord Hardwicke, in *Coze v. Phillips*, Lee, 237). An attorney who took an estate under a will, made a fictitious case for the opinion of the Court as to what particular estate he took. The Court, thinking no fraud was intended, only fined him £40, and ordered him to be imprisoned until the fine was paid (*In re Elsam*, 3 L. J. K. B. 75).

It is a contempt for a nominal plaintiff to try to deprive the real plaintiff of the fruits of his judgment. Thus a treasurer of a loan society took securities in his own name, having ceased to be treasurer. An action was commenced on a security so taken, on behalf of the society in the treasurer's name under an indemnity to him ordered by the Court, and prosecuted to execution. The treasurer colluding with the defendant discharged him from the execution. The Court granted an attachment for contempt against the treasurer: *McGregor v. Barratt* (6 C. B. 262).

It is also a contempt to deceive a solicitor by giving him false information for the purpose of his complying with an order of the Court. An order was made by a Judge on the plaintiff's attorney to declare "the place and abode of the plaintiff on pain of being guilty of contempt"

Contempt
to bring
fictitious
actions,
&c.

Contempt
by inter-
ference of
nominal
plaintiff.

Contempt
to deceive
solicitor in
giving in-
formation
to comply
with order.

—the plaintiff caused his attorney to deliver a false account of his name. The Court held the plaintiff's conduct amounted to a contempt of Court, and made him pay the costs of an application for an attachment against him: *Smith v. Bond* (14 L. J., N. S., Ex. 114).

Contempt to move arrested ship.

It is a contempt to move a ship from where she is lying after notice of the issue of a warrant for her arrest (the *Seraglio*, 10 P. D. 120).

Attaching executors liable to account to Crown.

As to the practice on applying for attachments against parties liable to the Crown as executors or trustees to render accounts or pay moneys which they have not done. See *In re Higgs & Others dec.* (5 Times L. R. 125).

Contempt to publish examinations under Companies Act.

Examinations under section 115 of the Companies Act, 1862, being intended for the information of the liquidator it is a contempt to publish prematurely any proceedings thereon (*In re American Exchange in Europe*, 58 L. J. Ch. 706).

Contempt in not attending to be examined, or to produce documents pursuant to order.

By R. S. C., Order xxxvii., rule 8, any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document, shall be deemed guilty of contempt of Court, and may be dealt with accordingly (see *Carew v. Carew* [1891], P. 360). The proceedings taken to enforce the attendance must be strictly regular, or they will be set aside (*Shurrock v. Lillie*, 4 Times L. R. 355).

Contempt to prevent infant obeying order.

It is a contempt to interfere with and prevent an infant obeying an order of the Court (*Thomas v. Gwynne*, 8 Beav. 312).

Disregard of a prohibition a contempt.

It is a contempt to prosecute the proceedings in an Inferior Court after writ of prohibition issued; or for an Inferior Court to disregard or ignore the orders of a Superior Court directed to it.

Revocation

It has been held to be a contempt of Court to revoke the

authority of an arbitrator before his award, where the reference had been made by order of the Court (*Haggett v. Welsh*, 1 Sim. 134). of arbitrator's authority contempt.

By the Sheriff's Act, 1887 (50 & 51 Vict. c. 55), certain offences therein mentioned (sec. 29) by a Sheriff, Under-sheriff, Bailiff or Sheriff's officer, may be dealt with by the Superior Courts "in like manner as for any contempt of such Court;" and any person assuming or pretending to be such an officer "shall be guilty of contempt," and liable to be punished as for contempt. Certain offences by Sheriffs, their officers, and others, contempts.

It is not possible in the compass of this treatise to elaborate, or even, perhaps, enumerate, all the instances in which a contempt of Court may arise—it will suffice generally to add that the High Court always, as far as possible, enforces obedience to its orders and respect to itself and its officers by proceedings founded upon contempt. "It is truly remarked that all the particular instances of contempts it would be endless to enumerate" (*per Williams, J., in Miller v. Knox*, 4 Bing. N. C. at p. 589). Not possible to enumerate all contempts.

The Court will, where necessary for the purpose, make special or particular precedents. The powers of the Court in the matter cannot be defined within any limits. The power to punish for contempt "may be extended to new cases as they arise, provided they be within the principle of those in which the power has been decided to exist" (*per Williams, J., in Miller v. Knox, supra*). Precedents may be made to meet particular offences.

As to non-compliance with the requisitions or orders of the Charity Commissioners with regard to charities, which default has by Act of Parliament been made a contempt of Court, see *Tudor's Charitable Trusts*, 3rd ed., pp. 473-4 and 538-9. Contempt by non-compliance with orders of Charity Commissioners.

The object of the discipline enforced by the Court in The object

of the discipline in contempt. cases of contempt is "to prevent undue interference "with the administration of justice" (*per* Bowen, L.J., in *Helmores v. Smith* (2) 35 Ch. D. at p. 455; and in *In re Johnson*, 20 Q. B. D. at p. 74). The primary question, therefore, in all cases of alleged contempt of Court, is whether there has or has not been an interference, or an attempt to interfere, with the due administration of justice.

No attachment lies for a future contempt. An attachment cannot issue for a future, contemplated, or apprehended contempt, or for not doing something which the party may be called upon to do or may not do (*Shurrock v. Lillie*, 4 Times L. R. 355). A person cannot be committed by anticipation, *e.g.* for default in paying any of the instalments of a certain sum when all the instalments are not due (*Reg. v. Judge of Brompton County Court*, 18 Q. B. D. 219). It is to be observed that on appeal the House of Lords, *nom. Stonor v. Fowle* (13 App. Ca. 20), did not disagree with this principle, but found that the facts of the case did not support it, and therefore overruled the decision. It was admitted in the arguments at the bar of the House that an anticipatory order for commitment upon a future default would be bad (13 App. Ca. at p. 22).

Leaving question of contempt to be determined by a jury. Upon any application to the Court to punish for an alleged contempt, the Court may, in the exercise of its discretion, leave the question of fact (*i.e.* whether or not the allegations on which the alleged contempt is founded are true or false) to be determined by a jury. It may be useful in cases of disputed facts to leave the question to be so determined.

Contempts of Ecclesiastical Courts and their. It is enacted by 53 Geo. 3, cap. 127, sect. 1, that where any person (being duly cited) neglects or refuses to appear before any Ecclesiastical Court, or neglects or

refuses to comply with its lawful orders, or commits a contempt in the face of the Court, the Judge may pronounce such person contumacious and in contempt, and may within 10 days signify (by "*significavit*." See Form in Schedule A to Act) such contempt to the Court of Chancery (now the Chancery Division of the High Court), and thereupon a Writ *de contumace capiendo* (see Form in Schedule B to Act) shall issue for the arrest of the offender; (for further information as to the practice in these cases, see *Green's Case*, 7 Q. B. D. 273; 6 App. Ca. 657, and see Phillimore's Ecclesiastical Law, pp. 1261, *et seq.*). The punishment of contempts of an Ecclesiastical Court is thus handed over to a secular Court. An Ecclesiastical Court could before this Act excommunicate for a contempt of its authority; by the Act excommunication (except in certain cases) was discontinued.

By R. S. C., Ord. XLII., r. 31, directors or other officers of a corporation are liable to attachment if any judgment or order against the corporation be wilfully disobeyed. A railway company was ordered to make certain connections between its line and the plaintiff's premises; the work was not done, and the directors of the company failing to prove that they had not meanwhile had in their hands funds of the company with which the work might have been done were ordered by the Court of Appeal to be attached, *Lewis v. Pontypridd, &c., Railway Co.* (11 Times L. R. 203).

punish-
ment.

"Signifi-
cavit."

Writ *de*
contumace
capiendo.

Directors
or other
officers of
a corpora-
tion liable
to attach-
ment if
orders
against the
corporation
be wilfully
disobeyed.

CHAPTER V.

CONTEMPTS, INDIRECT OR CONSEQUENTIAL ; AND THE DISTINCTION BETWEEN COMMITTAL AND ATTACHMENT, AND CONTEMPTS CRIMINAL AND NOT CRIMINAL.

Indirect
contempt.

THE consequential or more indirect form of contempt arises when a judgment or order of the Court, after having been made or pronounced, has been disobeyed, and it becomes necessary to enforce such order or judgment (assuming it to be one which the law now permits to be so enforced) by means of process against the person of the party refusing or neglecting to obey or observe it. Such process is effected by the issue of a writ of attachment or by an order of committal, each of which can only be obtained upon an application made (after due service) for the same. Such process is in the nature of execution upon the judgment or order.

Distinction
between
committal
and attach-
ment.

The distinction between committal for contempt and attachment for contempt still exists, although for some practical purposes it may be taken to be abolished. The operation of an order for committal is more summary and expeditious (but perhaps more expensive if the officer has to journey after the offender) than that of a writ of attachment. In the case of committal, the person in contempt is taken, wherever he may be, under the order by the tipstaff of the Court and lodged in Holloway Gaol, but in the case of attachment, the writ is executed by

the Sheriff's officer, and only runs into a particular county, enabling the culprit to shift from one bailiwick to another, and so evade the Sheriff's officer; the culprit (when caught) is lodged in the county or other gaol of the place where the writ has been enforced. In *Reg. v. Per Wills, County Court Judge of Lambeth* (36 W. R. at p. 476), ^{J., no practical difference.} Wills, J., said that there was no practical difference between committal and attachment. "One was enforced by the tipstaff of the Court, and the other by the Sheriff. That is all the distinction, and it comes to little if anything." But in the case of *Callow v. Young* (56 L. T., N. S., 147), Mr. Justice Chitty discussed at ^{In *Callow v. Young*, Chitty, J., held there was still a distinction.} some length the difference between process by attachment and process by committal, and shewed that there is still a distinction between the two. In *Callow v. Young* the plaintiff moved for liberty to issue a writ of attachment against the defendant for his contempt in committing a breach of an undertaking contained in an order whereby he undertook not to carry on a certain business. The notice of motion did not ask in the alternative that the defendant might be committed. The defendant objected that the proper remedy was committal, and that a motion for leave to issue an attachment could not be turned into a motion to commit, ^{Attachments sometimes bailable.} as an attachment was sometimes bailable, whereas a committal never was. Mr. Justice Chitty gave leave to amend the notice of motion by asking for committal, and made the following remarks on the distinction between attachment and committal: "The plaintiff moves for a writ of attachment, and the defendant's counsel takes the preliminary ^{Dicta of Chitty, J., on the distinction.} objection that the right remedy (if any) is not attachment, but committal. Under the former, as well as "under the present practice, in order to obtain an order

"for committal, notice of motion must be served on the
 "party sought to be committed, but under the former
 "practice it was not necessary to serve notice of motion
 "for attachment. Attachment issued at the instance of
 "the party aggrieved, and at his own risk. But since
 "the Judicature Acts the old practice has been altered,
 "owing probably to the abolition of imprisonment for
 "debt, and the abuses arising from it. The rule now
 "is that notice of motion must be served upon the
 "party sought to be attached. In this respect, there-
 "fore, attachment and committal stand on the same
 "footing, for neither attachment nor committal can be
 "obtained without notice of motion. The former dis-
 "tinction between committal and attachment was this :
 "*Committal was the proper remedy for doing a prohibited*
 "*act, and attachment was the proper remedy for neglecting*
 "*to do some act ordered to be done.* Now, there may be
 "some question whether in the present case the right
 "remedy is attachment or committal. As the late Sir
 "George Jessel said, 'For most practical purposes the
 "'former distinction has been abolished'" (see his
 opinion, expressed in *Sprunt v. Pugh* (7 Ch. D. 567),
 and referred to by Chitty, J., in *Harvey v. Harvey*
 (26 Ch. D. at p. 654)), "but there may be cases
 "where it would still be maintained. Thus, I remember
 "in a case where a motion was made to commit a
 "Receiver, the late Master of the Rolls considered that
 "the distinction was material, and that the proper
 "order was to grant leave to issue a writ of sequestra-
 "tion. Attachment goes to the Sheriff, and committal
 "to the officer of the Court, *and in cases of attachment*
 "*bail is sometimes admitted.* I adopted the method of
 "committal the other day myself, as being the most

Dictum of
 Jessel,
 M.R., on
 subject.

Attach-
 ment
 sometimes
 bailable.

"convenient and expeditious method. It was a case
 "where the party sought to be attached or committed
 "would probably have escaped the country if the most
 "expeditious way of dealing with him had not been
 "employed. I have made these observations to shew
 "that for some purposes there is still a distinction between
 "attachment and committal, though in substance it is
 "generally immaterial whether the motion be for attach-
 "ment or committal." In the same case Mr. Justice
 Chitty recalled leave to issue a writ of attachment for
 breach of an undertaking after service of the notice of
 motion on the solicitor of the party attached, on the
 suggestion of the Registrar that the breach of an under-
 taking was neither a judgment requiring an act to be
 done, "or to abstain from doing anything" (Ord. XLII.,
 r. 7), and that an attachment might not lie, but that
 committal was the proper remedy: *Callow v. Young*
 (55 L. T. 548, W. N., 1886, pp. 183, 209). It there-
 fore appears that *in the case of enforcing an undertaking,*
proceedings by committal may be the only remedy. Thus
 an important practical distinction exists between com-
 mittal and attachment.

Committal
 best course
 to enforce
 undertak-
 ing.

It is suggested that it is safer where there is any
 doubt as to the proper remedy (and particularly where
 it is sought to enforce undertakings), to ask by the
 notice of motion for attachment or committal in the
 alternative (see Form No. 5 in Appendix B). As to
 the distinction between attachment and committal, see
 the Memorandum of Mr. Registrar Lavie in Appen-
 dix A. This report of Mr. Lavie's has been held by the
 Court of Appeal to correctly state the practice (*In re*
Evans, Evans v. Noton [1893], 1 Ch. 252). Perhaps
 the best course would be to draw the following sharp

Practical
 conclusion
 as to the
 distinction.

Memoran-
 dum by
 Mr. Lavie.

Distinction
 between
 the two
 processes.

line of distinction between the two processes—namely, to make the writ of attachment apply to all cases where in Chancery, before the Judicature Acts, it issued without leave; and to make committal applicable in all other cases. If the proceedings be a step to compel a party to a cause to obey an order made in the cause the proceeding is rightly taken by way of attachment (*per* A. L. Smith, L.J., in *In re Evans, Evans v. Noton*, *supra* at p. 267); but if the proceeding be to punish a contempt of another character it is submitted that the right proceeding is an application to commit.

As to leave
to amend
notice of
motion for
attach-
ment or
committal.

With regard to amending a notice of motion asking for attachment when the proper remedy is committal, Chitty, J., said, in *Callow v. Young* (56 L. T., N. S., 147), “I should be very slow to give leave to amend the notice of motion if it were in any way likely that by so doing I should be doing an injustice to any party; but having the defendant here by his counsel, it seems that I should not be doing wrong in giving leave to amend the notice of motion, and for these reasons I have gone into the distinction between attachment and committal. I, therefore, give leave to amend the notice of motion by asking for committal in the alternative.

Order will
not be
altered *ex*
parte.

Clerical
slips
amended.

“The motion will stand over to be served again.” The Court will not on an *ex parte* application alter an order for leave to issue a writ of attachment into an order of committal (*Buist v. Bridge*, 29 W. R. 117). The Court will amend a clerical slip, and where the name of the wrong Judge was put on the notice of motion that Judge, on the objection being taken, directed the name of the Judge to be amended in the notice of motion, and then heard the motion at the request of the right Judge (*Taylor v. Roe*, 68 L. T. 213, W. N., 1893, p. 14).

The practice as to the service of the notice of motion does not stand on the same footing in cases of committal and attachment, because (as will be seen) in the former case the notice of motion must be served personally on the person sought to be committed, and in the latter case service of the notice of motion may be effected upon the solicitor on the record of the person sought to be attached. The marked distinction between the two applications (and one in favour of the application to commit) is the celerity with which an order to commit can be enforced by the immediate arrest, by the officer of the Court, of the offender under the order which can be at once drawn up, whereas a writ of attachment must be issued and lodged with the Sheriff. In committal the tipstaff can at once enforce the order; and there is also a "Serjeant-at-Arms" attending the Court who can enforce its orders (*G. v. L.*, [1891], 3 Ch. 126). It was formerly the practice in the Court of Chancery to enforce orders against receivers by committal after service of a four-day order, and not by attachment, as no attachment could issue against a person not a party to a cause, and it has been doubted whether an attachment may be had against a receiver who makes default in payment of a balance due from him (*In re Bell's Estate, Foster v. Bell*, L. R. 9 Eq. 172). But a writ of attachment has recently been ordered to go where the receiver was a party (*Re Gent, Gent-Davis v. Harris*, 40 Ch. D. 190).

Difference in practice as to service of notice of motion on applying to attach or commit.

Enforcing orders against receivers.

A writ of attachment which is included in the term "writ of execution," as used in the Judicature Rules (R. S. C., Ord. XLII., r. 8), has (under the Judicature Rules) the same effect as a writ of attachment issued out of Chancery formerly had (R. S. C., Ord. XLV., r. 1), and is not to issue without the leave of the Court or a

The writ of attachment.

Judge, to be applied for on notice to the party against whom the attachment is to be issued (*ib.*, rule 2).

When attachment issues.

1. Payment into Court.

2. To recover property.

3. To compel a person to do or not to do any act.

4. Payment of money in exceptional cases.

5. Solicitor.

6. Directors.

An attachment may issue (1) To enforce a judgment or order for payment of money into Court in cases in which attachment is for that purpose authorized by law, *i.e.* the exceptions } within section 4 of the Debtors Act, 1869 (R. S. C., Ord. XLII., r. 4). (2) To enforce a judgment or order for the recovery of any property other than land or money (*ib.*, rule 6). (3) To enforce a judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing anything (*ib.*, rule 7); and in particular against any party who fails to comply with any order to answer interrogatories or for discovery or inspection of documents (R. S. C., Ord. XXXI., r. 21); if the order disobeyed was made in Chambers by the Chief Clerk, it cannot be enforced by writ of attachment until after entry (*Ballard v. Tomlinson*, 52 L. J. Ch. 656; the concluding part of R. S. C., Ord. LV., r. 74, may affect this decision). (4) To enforce a judgment or order for the recovery by or payment to any person of any penalty, or sum, or costs, in cases within the exceptions mentioned in the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 4, and R. S. C., Ord. XLII., r. 3). (5) In the case of a solicitor upon whom an order against any party for interrogatories, or discovery, or inspection is served, and who neglects, without reasonable excuse, to give notice thereof to his client (R. S. C., Ord. XXXI., r. 23). (6) Against the directors or other officers of a corporation to enforce any judgment or order made against the corporation, and *wilfully* disobeyed (R. S. C., Ord. XLII., r. 31; *Lewis v. Pontypridd, &c., Co.*, 11 Times L. R. 203).

Most of the Rules above referred to mention *judgments* only, but every *order* of the Court or a Judge may be enforced against all persons bound thereby in the same manner as a judgment to the same effect (R. S. C., Ord. XLII., r. 24). Judgment and order.

As to committal for disobedience to a judgment or order,—a person may be committed to prison for disobeying a judgment or order requiring him to do any act other than the payment of money, or to abstain from doing anything (R. S. C., Ord. XLII., r. 7), or for breach of an undertaking given by himself, his counsel, or solicitor, to the Court. In the former case either attachment or committal is the punishment (although committal is the more appropriate remedy where a party has abstained from doing anything ordered to be done other than the payment of money); but in the case of the breach of an undertaking committal is perhaps the only proper penalty (see observations of Chitty, J., in *Callow v. Young*, 56 L. T., N. S., 147). Any neglect of duty by a Sheriff is punishable as a contempt (50 & 51 Vict. c. 55, s. 29; *Harvey v. Harvey*, 26 Ch. D. 644). Undertakings given by a solicitor as such, and not observed by him, are enforced by committal. Committal for disobedience to judgment or order.

By section 5 of the Debtors Act 1869, a person may be committed to prison (and here, as the Statute fixes that punishment, *committal is the proper remedy*) for a term not exceeding six weeks, or until payment of the sum due, for default in payment of any debt or instalment of any debt due from him, in pursuance of any order or judgment, when it is proved that the person has, or has had, since the date of the order or judgment, the means to pay, and has neglected or refused to pay. Committal is the remedy under the Debtors Act, s. 5.

see page 41

How writ
executed in
punitive
cases.

In the execution of a writ of attachment, the officer entrusted with its execution may, for the purpose of executing it, break open the outer door of the contemnor's dwelling-house, if the process is in its character punitive or disciplinary, but he cannot do so if the process is not of that character (*Harvey v. Harvey*, 26 Ch. D. 644). The process of execution, where it is criminal in its nature, may be executed on a Sunday (*Miller v. Knox*, 4 Bing. N. C., at p. 581).

Process of
contempt
in aid of
civil
remedy dis-
couraged.

Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice (see *In re Maria Annie Davies*, 21 Q. B. D. 236; *Republic of Costa Rica v. Erlanger*; *In re Clements*, 46 L. J. Ch. 375).

Case of
Mrs. Maria
Annie
Davies.

The distinction between a contempt which is of a criminal nature, and a contempt which is not in its nature criminal, does not seem to have been always clearly regarded by the Courts. Thus, in the case *In re Maria Annie Davies* (*supra*), it appears that Mrs. Davies was in December, 1886, imprisoned for contempt of Court in disobeying an injunction restraining her from further molesting the owner and tenants of an estate, the possession of which she had attempted to take by force, and that she had remained in prison until June, 1888, when the Court directed her to be brought before it to hear the terms upon which she might be released. The terms of the order were that the injunction should continue for the term for which the plaintiff held the premises, and that to prevent any future breach of the injunction by Mrs. Davies, a copy of the order should be given to the owner with a view to his obtaining the assistance of the police should she again attempt to obtain possession; that in case of

any breach of the injunction the official solicitor should upon the application of the plaintiff in the action take the necessary steps to bring the offenders before the Court and to enforce performance of the order; that *Mrs. Davies should not be allowed to issue any writ or summons, or make any application or motion against any person or persons without the leave of a Judge at Chambers being first obtained*, and that should notice of any application or motion be given without such leave, the official solicitor might be informed by letter, and the respondent should not be required to appear unless the Court should otherwise order. Mr. Justice Mathew, after stating the above order on behalf of the Court, made the following observations (for which he stated he was alone responsible): "I desire to express the opinion, that in cases "where the contempt for which punishment is inflicted, "is the doing of an act prohibited by an order of the "Court—where what has been done by the offender "cannot be undone—it is not advisable that an order "for committal should be so framed as to permit the "possibility of the lamentable consequences to the "prisoner which have followed upon the sentence in "this case. It should be borne in mind that contempt "of Court is a criminal offence, punishable as a mis- "demeanour by fine and imprisonment, or both (4 Black. "387; 2 Hawk. P. C. bk. 2, c. 22). The punishment "should be commensurate with the offence. It may be "severe where the contempt is grave; as, for instance, "in the rare cases where an insult is offered in Court "to the Judge who presides, or where a deliberate "attempt is made to interfere with the due and ordinary "methods of carrying out the law as in the case of "*Onslow and Skipworth*" (L. R. 9 Q. B. 219, 231).

"So where a witness refuses to give evidence in obedience
 "to a subpoena, he may be committed for contempt.
 "The commitment in such cases is described by Willes,
 "J., as a sentence upon a summary conviction for an
 "offence against the law; and, in the view of that very
 "learned Judge, a commitment for a time certain is
 "a correct, if not the only correct course: see *Ex parte*
 "*Fernandez*" (10 C. B., N. S., 39; 30 L. J. C. P. 31).
 "A commitment until the offender consented to give
 "evidence, would not in my judgment be the proper
 "order to make. On the other hand, where it appears
 "that the act done is due to a mistaken view of the
 "rights of the offender, the punishment, where imprison-
 "ment is deemed necessary, should be for a definite
 "period, and should not be severe." . . . "The offence
 "of Mrs. Davies, annoying and vexatious as it un-
 "doubtedly was, cannot be considered as of a serious
 "nature, or one meriting a long incarceration. I
 "regret that a form of order similar to that which we
 "now make was not adopted in the first instance."
 Lord Coleridge, C.J., agreed to the proposed order on
 the ground that it was assented to on behalf of the
 plaintiff in the action as affording him adequate pro-
 tection, and added (21 Q. B. D. at p. 240), "Where the
 "Court has given its decision, and the person against
 "whom the Court has decided defies the Court, ignores
 "its decision, and persists in persecuting the person in
 "whose favour the Court has decided with groundless
 "claims and vexatious actions, however reluctant the
 "Court may be to do so, it has, in my opinion, no choice
 "but to enforce its judgment by the imprisonment of the
 "contumacious person."

Distinction

It is at least doubtful whether the disobedience to the

order of the Court in the above case was (as it seems to have been there regarded) a criminal contempt. The distinction between contempts of a criminal nature and contempts of a nature not criminal was dealt with by the Court of Appeal in the case of *O'Shea v. O'Shea*, 15 P. D. 59; *Reg. v. Barnardo*, 23 Q. B. D. 305; and in *In re Freston*, 11 Q. B. D. 545, and by Chitty, J., in *Harvey v. Harvey*, 26 Ch. D. at p. 651. A contempt to be criminal must be so in its nature or by its incidents; and must be an offence which "*savours of criminality*" (see *per* Lord Brougham in *Long Wellesley's Case*, 2 R. & M., at p. 667). The distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court (or, as Cotton, L.J., stated in *O'Shea v. O'Shea*, *supra*, in not doing something ordered to be done in the cause) is not criminal in its nature. *In other words, where contempt involves a public injury or offence, it is criminal in its nature, and the proper remedy is committal—but where the contempt involves a private injury only it is not criminal in its nature, and the remedy is either attachment or committal—and perhaps more properly committal if the application is against a person not a party to the cause in which it is made—it being doubtful whether a writ of attachment can issue except in the nature of execution and against a party.* Lord Redesdale, in *McWilliam's Case*, 1 Sch. and Lef. at p. 174, said, "There can be no doubt that the thing to be considered is, not the form of the process, but the cause of issuing it, if the ground of the proceeding

between
contempts
criminal
and not
criminal in
their
nature.

The distinction
shortly
stated.

Dicta of
Lord Redes-
dale on the
subject.

“be a debt, it is a process of debt; if the ground be a contempt, as for instance, disobedience of some order of the Court where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature.”

Dicta of
Lord Esher,
M.R. on the
subject.

The subject was dealt with by Lord Esher, M.R., in *In re Freston*, 11 Q. B. D. at p. 553-4, as follows:

“That principle is that process to enforce civil obligations is subject to privilege, but process for acts in the nature of offences is not. Attachments are granted for neglect of obedience to the orders of Courts of Justice, when they are issued merely for the purpose of enforcing judgments in civil disputes, and when the breach of the order to do or not to do something cannot be said to be in the nature of an offence, then the privilege can be claimed; but where an attachment is issued for a breach of the law, or as a remedy for something that is a breach of the law and in the nature of an offence, no privilege can be claimed.”

Observations on the form of the order in *In re Davies*.

It is submitted that the order in *In re Maria Annie Davies* (21 Q. B. D. 236) was, so far as it purported to prevent Mrs. Davies from issuing any writ or other process without leave first obtained, wrong as being *ultra vires*. The mistakes (if any) in this case probably arose from Mrs. Davies not having professional assistance. The Rules of the Supreme Court prescribe the cases in which it is necessary to get the leave of the Court or a Judge to issue a writ (*i.e.* where it is sought to serve a writ out of the jurisdiction, or, to join certain causes of action), and it is submitted, that except as so prescribed the condition of obtaining leave prior to issuing a writ cannot be imposed. The Queen's Courts

are open to all her subjects. The true, and it is thought only, remedy in such cases as that of Mrs. Davies, is for the defendant to apply at once after writ issued to stay any proceedings which may be taken as vexatious, or an abuse of the process of the Court, if that view of them may reasonably be taken.

In some cases, the only penalty imposed for contempt will be the payment of the costs of the proceedings (as in *Little v. Thomson*, 2 Beav. 129). But recourse ought not to be had to the process of contempt in aid of a civil remedy when there is any other mode of doing justice (*Republic of Costa Rica v. Erlanger*, *In re Clements*, 46 L. J. Ch. 375); and the Court will discourage motions to commit when no real or merely a technical case for committal is made, and only an apology and costs are asked for, or really sought (*Plating Company v. Farquharson*, 17 Ch. D. 49; *Vernon v. Vernon*, 40 L. J. Ch. 118; *Hunt v. Clarke*, *In re O'Malley*, 37 W. R. 724; *In re Martindale* [1894], 3 Ch. 193). Where the interference of the Court as for alleged contempt is improperly sought the application ought to be refused with costs.

Applica-
tions made
merely to
get an
apology
and costs
dis-
courage
d;
and will be
refused;
and with
costs.

CHAPTER VI.

IMPRISONMENT FOR OFFENCES WITHIN THE EXCEPTIONS
TO THE DEBTORS ACT, 1869, SECTION 4, SUB-SECTION (3).

(Default in payment by Trustees and Others in a fiduciary Capacity.)

Exceptions
to the
Debtors
Act.

HAVING considered the various contempts of Court for which persons may be committed to prison, the offences excepted from the Debtors Act, and for which parties may also be imprisoned, must now be considered.

Whatever difficulty there may be in defining what is contempt of Court, there is no difficulty in defining the particular offences which arise under the exceptions to the Debtors Act, 1869. The Act, and the decisions thereunder, enable the offences excepted from its protection to be defined.

Former
practice in
Chancery,

and at
Common
Law.

Under the former practice of the Court of Chancery an attachment for an indefinite period to enforce an answer, or an order or decree for the payment of money or the payment of costs, issued as of course, and (as was said) *ex debito justitiæ*. Under the former practice at Common Law a writ of *ca. sa.* (*capias ad satisfaciendum*), under which the body of the person in default was taken by the Sheriff, issued without leave to enforce any judgment for the payment of any debt exceeding £20. But by the Debtors Act, 1869 (which

came into operation on the 1st of January, 1870), the penalty of imprisonment for debt was, with certain exceptions therein and hereinafter mentioned, abolished.

The effect of this Act has been undoubtedly to render judgments and orders for the payment of money less Effect of the Debtors Act. effectual than they were before it came into operation, and to enable in certain cases persons living in apparent comfort, and sometimes even luxury, to escape payment and to defy the process of the Courts. The policy of the Act, and particularly the wisdom of the practice requiring the creditor to give proof before the provisions of the exceptions to section 5 are put in operation, that the person making default in paying can pay, instead of making such person prove inability to pay, has been much doubted.

By section 4 of the Debtors Act, 1869 (32 & 33 Vict. Debtors Act, s. 4. c. 62), it is enacted as follows (namely):—

“With the exceptions hereinafter mentioned no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

“There shall be excepted from the operation of the above enactment,

1. “Default in payment of a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract.

2. “Default in payment of any sum recoverable summarily before a justice or justices of the peace.

3. “Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control.

4. “Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such,

or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order.

5. "Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order.

6. "Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made.

"Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section, *for a longer period than one year*, and secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money, except as regards the arrest and imprisonment of the person making default in paying such money."

The Act
intended to
punish
fraud.

It is proposed here to deal with the 3rd and 4th of these exceptions only. The Act has now been in force a quarter of a century, and many points have arisen on it and been determined. The Act, while abolishing the penalty of imprisonment for debt in the case of an honest debtor, was intended for the punishment of a fraudulent or dishonest one, and was in that sense vindictive (*per Jessel, M.R., in Maris v. Ingram*, 13 Ch. D. 338); not following the dictum of Bacon, V.C., that the policy of the Act was not vindictive, its object being simply to produce payment of the money (see *Barrett v. Hammond*, 10 Ch. D. 285).

Object and
meaning of
the Act.

The Act is punitive. See the considered judgment of Lindley, L.J., on this subject in *In re Smith, Hands v. Andrews* [1893], 2 Ch. 1. "The exceptions" (in the Statute) "are all of a character which indicates that

"the legislature wished merely to limit the term of imprisonment in regard to certain debts, which were not simple debts contracted in the ordinary intercourse between man and man where credit is given by one person to another, but were debts the incurring of which was in some degree worthy of being visited with punishment." . . . "In every case there is something of the character of delinquency pointed out" (*per Lord Hatherly, L.C., in Middleton v. Chichester, L. R. 6 Ch. at pp. 156-7*).

The object of the Act was to prevent "the imprisonment of persons for non-payment of ordinary debts" (*per Cotton, L.J., in Bates v. Bates, 14 P. D. at p. 19*). What do the words "payment of money" in this section mean? "In my opinion they do not mean depositing a sum of money in Court to abide an order to be subsequently made" (*per Lindley, L.J., in Bates v. Bates, supra, at p. 20*).
Act intended to prevent imprisonment for ordinary debts. What payment of money means.

The Act "deals with a sum of money," and has no application to an order to deliver bills and cheques, or to pay moneys received in respect of them—and in fact does not interfere with the power of the Court to commit for breach of an order directing an act to be done, or, in the alternative, the payment of money. The circumstance that the order was in the alternative has been held not to alter its character (*Harvey v. Hall, L. R. 11 Eq. 31*). The Court can in any case attach for breach of an order to do an act other than the payment of money, *e.g.* for not depositing or handing over bonds (*Linwood v. Andrews, 31 Sol. Journ. 410*).
Order to pay money or do some other act. Attachment issues for not doing act.

A breach of an undertaking to pay money is equivalent only to "default in payment of a sum of money," and since the Debtors Act such an undertaking cannot in
Breach of undertaking to pay is equivalent

only to
default in
payment,
and cannot
necessarily
be enforced
as an under-
taking.

the absence of proof of means to pay (to bring it within sect. 5) be enforced by attachment or commitment (*Buckley v. Crawford* [1893], 1 Q. B. 105). In this case the Judge in Chambers (Bruce, J.) held that an attachment ought to go on the ground that the person who gave the undertaking had thereby got an order for his advantage upon the terms of a bargain with the Court, whereby he undertook to make good the deficiency on a certain sale, and that it was trifling with the Court for a person without means to give such an undertaking and thereby to obtain an advantage over his opponent and then not to pay. However, the Divisional Court on appeal took a different view and discharged his order. But a great deal may nevertheless be said to support the view of Bruce, J. In *Preston v. Etherington* (37 Ch. D. 104) the Court of Appeal held a party bound by an admission made by his counsel to the Court, and entered in the order, upon the footing of which he was directed to make a payment, and ordered his attachment in default of his paying. But in *Farley v. Buckler* (the "*Times*," 30th October, 1893), Kennedy, J., refused to attach a solicitor who had by a consent order undertaken as a suitor, and not in his character of solicitor, to pay certain costs.

Amending
Act of 1878
gives Court
discretion
as to
awarding
imprison-
ment.

It having been held that under the Debtors Act, 1869, the Court had no jurisdiction or discretion in the excepted cases to refuse to issue the attachment, or to discharge the imprisoned defaulter before the expiration of the year mentioned in the Act, it was by the Debtors Act, 1878 (41 & 42 Vict. c. 54, "*Marten's Act*"), enacted that in any case coming within the exceptions numbered 3 and 4 in the 4th section of the Debtors Act, 1869, or within either of these exceptions, "Any Court or Judge

“making the order for payment, or having jurisdiction
 “in the action or proceeding in which the order for
 “payment is made, may inquire into the case, and
 “(subject to the provisos contained in the said sections
 “respectively) may grant or refuse, either absolutely
 “or upon terms, any application for a writ of attach-
 “ment or other process or order of arrest or imprison-
 “ment, and any application to stay the operation of
 “any writ, process, or order, or for discharge from
 “arrest or imprisonment thereunder.”

There is a great difference between the case of a trustee who has received and applied trust money to his own use and the case of one who has not done so, but has only been made liable to make good a trust fund by reason of his mistake or negligence. North, J., in the exercise of his discretion under “Marten’s Act,” refused to commit or attach a trustee who could not pay and had not actually received or misapplied any part of the trust fund in question. *Earl of Aylesford v. Earl Poulett* [1892], 2 Ch. 60. A trustee who accepts a trust and merely neglects it, and allows his co-trustee to have sole control, is not dishonest or fraudulent and ought not to be punished for the default of his co-trustee (*per* Court of Appeal in *In re Smith, Hands v. Andrews* [1893], 2 Ch. at p. 18).

The Debtors Act, 1869, has been held by the Court of Appeal to extend to an application under 41 Geo. 3, c. 90, to commit for disobedience to a decree of the Irish Court of Chancery (*Ferguson v. Ferguson*, L. R. 10 Ch. 661).

The Act not expressly mentioning the Crown does not bind the Crown, and therefore does not apply to a Crown debt—whether in respect of costs or otherwise—

and the power of imprisonment in respect thereof continues (*In re Smith*, 2 Ex. D. 47).

Subsequent
agreement
modifying
judgment
or order.

If an arrangement is made after the judgment or order for payment, under which its terms are interfered with (as by agreeing to take payment by instalments or otherwise), without saving the rights under the judgment or order, the right to a subsequent attachment to enforce the judgment or order will be lost (*per* Bacon, V.C., in *Harvey v. Hall*, L. R. 16 Eq. 324). Similarly a plaintiff who has levied execution in an action against a trustee for a sum admittedly received by him, cannot by subsequently getting an order absolute for payment of the like sum within a certain time take advantage of an attachment under the Debtors Act (*Drewitt v. Edwards*, 26 W. R. 60).

Adminis-
trator a
"trustee"
though
grant re-
voked.

Default by an administrator in paying over money received under a grant subsequently revoked renders him liable to attachment. Thus, where letters of administration were granted to a widow upon the suggestion of her husband's intestacy, and she had received thereunder part of his property, and the letters were subsequently recalled in an action propounding a will of the deceased, and she was ordered to pay the money she had received to an administrator *pendente lite*, which order she had not obeyed, it was held by Butt, J., that she was not protected by the Debtors Act, 1869, and was liable to attachment (*Tinnuchi v. Smart*, 10 P. D. 184).

Order to
give
security
for costs in
Divorce
Court.

An order of the Divorce Court to pay money into Court or give a bond as security for a wife's costs is not within the benefit of section 4 of the Debtors Act, and an attachment can issue for contempt in disobeying the order, but a direction to pay taxed costs is within the

benefit of the section (*Bates v. Bates*, 14 P. D. 17, and see *Lynch v. Lynch*, 10 P. D. 188). But see *Clarke v. Clarke* [1891], P. 278, where *Bates v. Bates* was distinguished by Sir Francis Jeune.

A creditor, who has received money from a bankrupt by way of fraudulent preference, and has been ordered to repay it to the trustee of the bankrupt's estate, is not a person holding money in a fiduciary capacity under the 4th section of the Debtors Act, and cannot therefore be committed to prison thereunder (*Ex parte Hooson, In re Chapman and Shaw*, L. R. 8 Ch. 231). Creditor fraudulently preferred not committed.

There is no power to commit a trustee in bankruptcy who having undertaken to pay what was due in the bankruptcy from the trustee he succeeded, made default in so doing (*In re Hincks, Ex parte Cuddeford*, 45 L. J. Bank, 127). Trustee in bankruptcy.

For the purpose of bringing a trustee within the third exception of section 4 of the Act it must appear that the money ordered to be paid by him has at some time been actually "*in his possession or under his control*," and hence no attachment can be issued against a trustee on an order directing the payment of a sum composed of principal and interest not distinguished, inasmuch as the interest might not at any time have been in his possession or under his control (*Middleton v. Chichester*, L. R. 6 Ch. 152; *In re Hickey, Hickey v. Colmer*, 35 W. R. 53; and see *In re Walker*, 38 W. R. 766). An order to deposit bonds or to pay their proceeds if sold, is not while the bonds remain unsold an order for payment of money within the Act (*Linwood v. Andrews*, 81 Sol. Journ. 410). "In his possession or under his control."
Order to pay mixed principal and interest.

A trustee in liquidation ordered to pay the taxed costs of the solicitor in the liquidation, and the costs of the Taxed costs of solicitor in

a liquidation.

motion upon which the order was made, cannot on default be committed for contempt in disobeying the order, as the costs of the motion could not be said to be moneys in his hands as a trustee within the Debtors Act (*Ex parte Sharp, In re Hind*, 37 L. T. 168).

Executor not paying debt due from him to testator.

In *In re Woodward* (30 Sol. Journ. 758), Stirling, J., held that an executor who was a debtor to his testator's estate, could not be attached for default in payment of the debt. This decision (given in the Vacation) is perhaps open to reconsideration (see *In re Hickey, supra*).

Trustee neglecting to recover money.

A trustee who was ordered to pay money which he had merely neglected to recover is not within the third exception of section 4 of the Act, and cannot be committed for default in paying the money (*Ferguson v. Ferguson*, L. R. 10 Ch. 661).

Or to pay value of bonds improperly converted.

And where trustees improperly sold bonds, and were held liable as for a breach of trust, and ordered to make good the value and not the amount thereof received by them, and it appeared that the value of the bonds at the date of the judgment was greater than at the time of their sale, and that the difference between the amount produced by the sale and what was ordered to be paid had never come into the trustees' hands, Stirling, J., upon the ground *that part of the sum which the trustees had been ordered to pay did not come into their possession, and was not under their control*, refused with costs a motion to attach them (*In re Walker*, 38 W. R. 766, following North, J., in *Cronin v. Twinberrow*, 32 Sol. Journ. 44).

When a director of a Company is or is not a defaulting trustee.

A director of a Company ordered under the 165th section of the Companies Act, 1862 (now repealed, but re-enacted by section 10 of the Companies Winding-up Act, 1890), to pay the full value of shares received by

him from the promoter, upon which no money had been paid is not a defaulting trustee, and will not be committed (*In re Diamond Fuel Co., Metcalfe's Case*, 13 Ch. D. 815); but according to the dictum of the Judge (Malins, V.C.) in this case, if a director receives money belonging to a Company, and misappropriates it, "it is perfectly clear he would be liable to be committed" (*ib.* at p. 819). A director of a Joint Stock Company is (for some purposes at least) in a fiduciary position towards the Company (*Coleman's Case*, L. R. 6 H. L. 189). A sale by a promoter to his Company was set aside for fraud, and the promoter was ordered to repay the purchase-money to the Company; no part of the money was paid, and the Company moved to attach the promoter; it was held by Malins, V.C., that attachment could not issue because the promoter was not under the circumstances "a trustee or person acting in a fiduciary capacity" within the 3rd exception to section 4 of the Debtors Act, 1869 (*Phosphate Sewage Co. v. Hartmont*, 25 W. R. 743).

There is no power to grant an attachment for non-payment of arrears of alimony due under a final order of divorce (*De Lossy v. De Lossy*, 15 P. D. 115). Alimony not within exception.

Where a trustee has made default in paying a sum ordered to be paid, and admitted to have been in his possession, an attachment may be issued against him, although he may have spent the money before the order, and be unable to pay (*Middleton v. Chichester*, L. R. 6 Ch. 152). Inability to pay not an excuse.

A residuary legatee being entitled to a sum of money which the trustee of the will admitted having received, obtained judgment against the trustee in an action in the Exchequer Division, and levied execution. The Order will not be made to supplement a judgment at law.

execution did not produce sufficient to satisfy the judgment, and the plaintiff applied for an order on the trustee to pay the money within a definite time, intending on his making default to attach him under section 4, sub-section 3, of the Debtors Act; it was held by the Court of Appeal that the order asked for could not be obtained after judgment in the Common Law Division (*Drewitt v. Edwards*, 26 W. R. 60 & 122).

Order must specify amount to be paid.

The order to be obeyed must specify the amount to be paid. Thus, where the order was to pay into Court the proceeds of the testator's estate, which had been realized, *the amount thereof to be verified by affidavit*, it was held that no attachment could be issued (*In re Spicer*, W. N., 1881, p. 85).

No default until service of order.

The person ordered to pay is not in default until the order has been served upon him, if payment is ordered after service of the order (*Colverson v. Bloomfield*, 29 Ch. D. 841).

Money must be of nature mentioned in Act.

The order for payment, or the evidence to support the application to enforce it, should shew that the money ordered to be paid was of the nature to bring the person in default within the exception to the Act (*Brewster v. Prior*, 3 Times L. R. 590).

But need not be in sole possession of the trustee.

To bring a trustee or person acting in a fiduciary capacity within the 3rd exception of section 4 of the Act, it is not necessary that the money should have been in his sole possession, or under his sole control. Therefore, where a sum of money forming part of the assets of a testator's estate was paid into a bank to the joint account of two executors with power to one of them to draw cheques, and he drew out the money and misapplied it, and an order had been made against both executors for payment of the money into Court, it was

held (affirming the decision of Jessel, M.R.), that the other or innocent executor was within the exception, and that as he had given his co-executor the opportunity of misapplying the money, a writ of attachment must issue against him for non-payment (*Evans v. Bear*, L. R. 10 Ch. 76). This decision was before the Debtors Act, 1878, giving a discretion to the Court in these matters, and it is conceived that the case would not now be similarly decided; see *Earl of Aylesford v. Earl Poulett* [1892], 2 Ch. 60.

An action will not lie against a governor of a gaol who complies with an order of attachment for detaining the prisoner beyond the year mentioned in the Act, as he is protected by the exigency of the writ (*Greaves v. Keene*, 4 Ex. D. 79). No action against governor of gaol.

Since the Debtors Act, an ordinary litigant will not be committed for not paying costs (*Hewitson v. Sherwin*, L. R. 10 Eq. 58); and a defendant who has cleared his contempt cannot be detained in prison for non-payment of the costs of his contempt, but the Court in ordering his discharge will make it part of the order that he do pay the costs of his contempt and of the motion to discharge him (*Jackson v. Mawby*, 1 Ch. D. 86). Nor has the Court jurisdiction to commit to prison for default in payment of the costs of a motion for attachment (*Micklethwaite v. Fletcher*, 27 W. R. 793; and see also *In re Hind, Ex parte Sharpe*, 37 L. T. 168). Non-payment of costs no ground for committal.

Where costs have been occasioned by a solicitor's misconduct an attachment will go for their non-payment (*Re Freston*, 11 Q. B. D. 545). And in the Queen's Bench Division as part of the punishment for contempt the costs of an application to commit have been ordered to be paid within a fixed time, and the order for com- Secus, if occasioned by solicitor's misconduct. In the Q. B. D. order for committal has been

directed to go for not paying costs.

mittal directed to go if the costs were not so paid, and if they were paid, then not to issue (*In re Rochester Election Petition*, the "*Times*," 9th December, 1892). This decision seems contrary to the principle of Sir George Jessel's decision in *Micklethwaite v. Fletcher* (*supra*).

In Chancery payment of costs not in Chancery made a condition precedent to release.

It is not the practice (in the Chancery Division at least) to make payment of the costs of his contempt a condition precedent to the prisoner's discharge (*per* Chitty, J., in *In re Jarvis*, W. N., 1886, p. 118). Nor is it the practice in the Probate Division to issue an attachment for non-payment of costs (*Weldon v. Weldon*, 10 P. D. 72). But in the Queen's Bench Division it seems to be the practice to make a prisoner who has cleared his contempt pay the costs before getting his discharge (*per* Day, J., in *Clarke v. Dyson*, 26 Sol. Jour. 731). This dictum is contrary to the established rule in the Chancery Division (see *Jackson v. Mawby*, 1 Ch. D. 86, and *In re Jarvis*, *supra*); and, contrary, it is also submitted to the principle of the Debtors Act. The practice in the two Divisions ought to be uniform on this subject.

Husband may be attached for not finding security for his wife's costs of a divorce suit.

However, notwithstanding the provisions of the Debtors Act, a husband is liable to attachment if he does not find security as ordered for his wife's costs of suit, upon the ground that this is not "default in payment of a sum of money" within section 4 of the Act (*Lynch v. Lynch*, 10 P. D. 183; approved *Bates v. Bates*, 14 P. D. 17). The principle of these cases

But seems only when it appears he has the means to find it.

is difficult to understand unless the decisions turned upon the fact that the persons in default were able to find the required security and obstinately refused to give it. In *Clarke v. Clarke* [1891], P. 278, Sir F. Jeune held that the question of whether the default

arose from wilfulness on the husband's part, or from inability to pay, must be considered. And in *Shine v. Shine* [1893], P. 289, being satisfied that the respondent had the means, and could comply with the order if he chose, Sir F. Jeune ordered the attachment to go.

In a case where a prisoner had been committed for contempt in interfering with a ward of Court, and had been ordered to be discharged upon payment of certain costs, taxed at £279 7s. 7d., Bacon, V.C., refused to discharge him without payment of the costs, although he pleaded inability to pay them (*S— v. L—*, W. N., 1876, p. 220). This decision was afterwards affirmed by the Court of Appeal sitting in private (*In re M.*, 46 L. J. Ch. 24). In a special contempt of that kind the Court would have jurisdiction to fix the terms upon which the contemnor should be permitted to purge his contempt.

If the debt for the non-payment of which the defaulting trustee is sought to be attached is provable in bankruptcy, and the trustee is bankrupt, then, pending the bankruptcy proceedings, he is not now protected from arrest by section 9 of the Bankruptcy Act, 1883 (*In re Smith, Hands v. Andrews* [1893], 2 Ch. 1).

And in the case of a solicitor making default in paying money, he has been ordered to pay in his character of an officer of the Court, an attachment will issue, notwithstanding the bankruptcy (*In re Wray*, 36 Ch. D. 138; *In re Edye*, 39 W. R. 198).

Upon a consideration of the authorities on this subject: *Cobham v. Dalton*, L. R. 10 Ch. 655, and *In re Simes, Simes v. Newberry*, 38 W. R. 570, must be treated as no longer of binding authority; it being now established that the remedy against the property or

A person in contempt for interfering with a ward of Court will only be discharged on payment of costs.

Effect of the bankruptcy of a trustee as a protection from arrest.

Punitive remedy of Act is unaffected by bankruptcy of offender.

Consideration of the authorities on this subject.

person of a debtor, prohibited by section 9 of the Bankruptcy Act, 1883, is in respect of a debt, and intended to enforce payment of that debt, whereas the remedy by committal or attachment under the Debtors Act, 1869, is punishment for an offence. And therefore the prohibition contained in the Act of 1883 does not take away the jurisdiction of the Court to order, under section 4, sub-sec. 3, of the Act of 1869, the committal or attachment of a defaulting trustee, against whom a receiving order in bankruptcy has been made (*per* the Court of Appeal in *In re Smith, Hands v. Andrews* [1893], 2 Ch. 1).

A person attached and in prison not discharged on his bankruptcy.

The Court of Appeal refused to interfere with the discretion of Malins, V.C., who had refused the application of a bankrupt (attached before the bankruptcy and in prison) for discharge, giving him leave to renew his application after he had passed his final examination (*Earl of Lewes v. Barnett*, 6 Ch. D. 252).

On bankruptcy proceedings to attach not interfered with.

The Court of Bankruptcy will not interfere to stay, pending the bankruptcy, further proceedings on an attachment applied for in Chancery, as the jurisdiction to interfere in bankruptcy is discretionary, unless good reason be shewn why it should interfere (*In re Mackintosh*, 13 Q. B. D. 235).

"Persons acting in a fiduciary capacity" (who are).

The words "person acting in a fiduciary capacity," as used in the 3rd exception in section 4 of the Act, mean "a person who stands in a fiduciary relation towards any other person who may be entitled to call upon him to pay, whether such other person is, or is not the plaintiff, or one of the plaintiffs in the action in which the order for payment has been made" (*Marris v. Ingram*, 13 Ch. D. 338). Therefore, a manager of a farm (*Marris v. Ingram*, *supra*), an agent (*Hutchinson v. Harmond*,

W. N., 1877, p. 29), an auctioneer (*Crowther v. Elgood*, 34 Ch. D. 691), a town agent of a country solicitor (*Litchfield v. Jones*, 36 Ch. D. 580), a man who by an order of compromise in an action was directed to hold a sum on certain trusts (*Preston v. Etherington*, 37 Ch. D. 104), and a receiver (*In re Gent, Gent-Davis v. Harris*, 40 Ch. D. 190), who made default in paying the amounts found due from them and ordered to be paid, have been all held to be within the exception in the Act, and liable to be arrested and imprisoned for their default. An executor or administrator is clearly within the exception in the Act (*per Kay, J.*, in *In re Hickey, Hickey v. Colmer*, 35 W. R. 53; and see *Tinnuchi v. Smart*, 10 P. D. 184).

But the remedy under the Act is only applied as between trustees and *cestuis que trustent*, and not at the instance of a mere creditor for whom the person against whom he seeks to assert the remedy was in no sense a trustee (*per Kay, J.*, in *In re Firmin*, 57 L. T. 45; and *per Cotton, L.J.*, in *Preston v. Etherington*, 37 Ch. D. at p. 109). Accordingly Chitty, J., has held that one partner receiving money or other assets of the partnership on account of himself and his co-partner does not receive the money or assets in a fiduciary capacity, and is therefore entitled to the protection of the Debtors Act, and cannot be attached for not paying the money (*Piddocke v. Burt* [1894], 1 Ch. 348). There is no fiduciary relationship between one partner and his co-partners (*Knox v. Gye*, L. R. 5 H. L. 656).

It need not be stated in the order sought to be enforced that the person ordered to pay is "a trustee or person in a fiduciary capacity," or that the "sum is in his possession or under his control;" but such

Remedy of Act not applied at instance of mere creditor.

And does not apply to partner not paying what he owes to partnership.

Form of order to pay so that it can be enforced by committal; ground of

committal
should be
shewn.

matters, if not appearing on the order, should be proved *aliunde* on applying to enforce the order; but it is desirable that the fact that the trustee is charged or ordered to pay by reason of having had the money in his possession or under his control should appear upon the face of the judgment or order by which he is ordered to pay (*Brewster v. Prior*, 3 Times L. R. 590). Orders for committal should shew upon their face the ground upon which they were issued, *Ex parte Van Sandau* (1 Phil. at pp. 6-8).

Inability to
pay no
ground for
refusing
attach-
ment.

The Act was intended for the punishment of fraudulent trustees, and to deter others, and mere inability to pay by a trustee who has committed a fraudulent breach of trust is not a sufficient ground to induce the Court, in the exercise of its discretion under the Act, to refuse an attachment; per Kay, J., in *In re Knowles* (52 L. J. Ch. 685, and see *Middleton v. Chichester*, L. R. 6 Ch. 152).

No com-
mittal
ordered
for an
anticipated
default in
payment.

Commitment can be ordered only in respect of a past default in payment, and there must not be an anticipatory order for commitment in respect of any future default (*Stonor v. Fowle*, 13 App. Cas. 20). It is not competent for any Court to make an order for an attachment or sequestration upon a future or uncertain event, so that no writ of attachment or sequestration can be ordered to issue by anticipation on the assumption that a sum ordered to be paid or an act ordered to be done by a time not then expired will not be paid or done—therefore the Court of Appeal varied an order which directed payment within four days after service of the order, and in default of such payment ordered by the same order a sequestration to issue, *In re Lumley, Ex parte Cathcart* (42 W. R. 401).

Circum:-

As to who are fraudulent and dishonest persons

against whom attachments ought to issue: see *Marris* stances in which attachment ought to issue. *v. Ingram* (13 Ch. D. 338); *In re Freston* (11 Q. B. D. 545); *In re Dudley* (12 Q. B. D. 44); *In re Par-nell* (W. N. (1884), p. 172); *In re Wray* (36 Ch. D. 138); and *In re Gent* (40 Ch. D. 190). And see *Treherne v. Dale* (27 Ch. D. 66), where the trustee told a story (which was disbelieved) of having put the trust money in cash in a bag which he lost in a restaurant.

But upon an application for an attachment against a defaulting trustee, the Court has jurisdiction to inquire The Court will take into account all the circumstances. into the circumstances of the case, and where there has been no actual fraud or embezzlement, but merely an erroneous application of the trust fund, and it is shewn that the debtor has no means of payment, may in the exercise of its discretion refuse an application for an attachment: *Holroyde v. Garnett* (20 Ch. D. 532); *Earl of Aylesford v. Earl Poulett* [1892], 2 Ch. 60; see also *Barrett v. Hammond* (10 Ch. D. 285); *Street v. Hope* (noted *ib.*, at p. 286). But it is not necessary in order to obtain an attachment against a defaulting trustee to shew that he has been guilty of actual fraud: *per* Cotton and Lopes, L.JJ., in *Preston v. Etherington* (37 Ch. D. 104).

The words "any sum or sums of money" as used in the Act will include stock, and it has therefore been includes stock. held, that where a trustee was ordered to transfer a fund of Consols admitted to be due from him, and subsequently made default, a writ of attachment might issue (*per* James, L.J., in *Digby v. Turner* (21 W. R. 471).

If at the time the order was made the person in default occupied a fiduciary position, the mere fact that Defaulting trustee may be

committed though he has ceased to be a trustee.

he has ceased to occupy that position when the application for attachment or committal is made will not prevent the order going: *In re Strong* (32 Ch. D. 342), and see *In re Gent, Gent-Davis v. Harris* (40 Ch. D. 190). The periods for ascertaining whether the person ordered to pay holds the necessary fiduciary character are: (1) the period when the act was done, or (2) at latest the time of making the order: *In re Strong* (*supra*); see also *Tinnuchi v. Smart* (10 P. D. 184).

Order punitive where contumacious refusal to pay.

An order of committal for contumaciously refusing to pay a debt is punitive in its nature (*Stonor v. Fowle*, 13 App. Ca. 20, and *In re Watson, Ex parte Johnson* [1893], 1 Q. B. 21); and is not merely a remedy for enforcing payment of a money demand (*Mitchell v. Simpson*, 23 Q. B. D. 373; and 25 Q. B. D. 189).

Married woman trustee, power to punish.

It is conceived that by virtue of the Married Women's Property Act, 1882, a married woman who is a trustee can be punished under sub-section 3 of section 4 of the Debtors Act for default, as if she were a *feme sole*; for the word "contract" as used in the Married Women's Property Act, 1882, includes the acceptance of a trust, and the provisions of that Act as to liabilities of married women are expressly extended to all liabilities by reason of any breach of trust committed by any married woman being a trustee either before or after her marriage; see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 24. But under section 5 of the Debtors Act there is no power to commit to prison a married woman for her default in paying a sum for which judgment has been recovered against her by virtue of section 1, sub-section (2) of the Married Women's Property Act, 1882 (*Scott v. Morley*, 20 Q. B. D. 120).

Order for discharge.

It was formerly held that an order was necessary for

the discharge of the prisoner from custody after the period of one year mentioned in the Act had expired (*In re Thompson's Estate, Nalty v. Aylett*, 43 L. J. Ch. 731); but now it is the practice to append to all writs of attachment issued under section 4 of the Debtors Act this note (namely): "Note—This writ does not authorize an imprisonment for any longer period than "one year,"—and no order is then necessary for the discharge of the prisoner: (*In re Edwards, Brooke v. Edwards*, 21 Ch. D. 230). It is usual to attach for offences within the exceptions of the Debtors Act, but if an offender was ordered to be committed, it is assumed that the duration of an order of committal would be limited in the same way.

The Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), gives no jurisdiction to commit a judgment debtor to prison under the Debtors Act upon the certificate of a judgment obtained in Ireland and registered in England under the former Act, inasmuch as such committal is not a process of execution, and the general words of section 1 of the Judgments Extension Act giving jurisdiction in the English Courts upon such a judgment are controlled by section 4 and limited to execution under that Act (*In re Watson, Ex parte Johnson* [1893], 1 Q. B. 21).

Note to writ of attachment limiting its duration.

Irish judgment registered in England.

Committal not process of execution.

CHAPTER VII.

IMPRISONMENT FOR OFFENCES WITHIN THE EXCEPTIONS TO
THE DEBTORS ACT, 1869—*continued.**(Section 4, sub-section 4.—Defaults by Solicitors.)*

IN the last chapter the cases have been examined in which a trustee or person acting in a fiduciary capacity may be imprisoned for default in payment of a sum in his possession or under his control. It is intended in the present chapter to treat of default by a solicitor which renders him liable to similar punishment.

Debtors
Act, 1869,
s. 4, sub-
s. 4.

The 4th sub-section of the 4th section of the Debtors Act, 1869 (on which the position of a solicitor in this respect depends), is in the following terms:—"Default by an attorney or solicitor in payment of costs, when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order."

Discretion
of Court as
to making
order.

It was held that under this provision the Court had no discretion, but must give leave to issue a writ of attachment against an entirely innocent member of a firm of solicitors: *In re A. and B.*, Solicitors (W. N., 1877, p. 207); but this was remedied by Mr. Marten's Act (namely), the Debtors Act, 1878 (41 & 42 Vict. c. 54).

No order is now necessary for the discharge at the expiration of the period of one year mentioned in the Act of a solicitor imprisoned under this provision. Discharge of prisoner.

A solicitor who has made default in payment of a sum of money due from him in his character of a solicitor, and has been adjudicated bankrupt, is not entitled to be discharged from custody under a writ of attachment, nor is he protected from arrest: *In re Deere* (L. R. 10 Ch. 658); *In re Wray* (36 Ch. D. 138); *In re Edye* (39 W. R. 198). Bankruptcy of solicitor.

The words "sum of money" as used in the subsection will include stock: *Digby v. Turner* (21 W. R. 471). "Sum of money" includes "stock."

Disobedience by a solicitor to an order of Court made against him as an officer of the Court is a contempt of a criminal nature, and an attachment granted to enforce compliance with the order is process of a punitive and disciplinary character: *In re Freston* (11 Q. B. D. 545); *In re Dudley* (12 Q. B. D. 44); *In re Strong* (32 Ch. D. 342); *In re Wray* (36 Ch. D. 138); and it now seems that no appeal lies against any order to attach or commit him for such disobedience: *O'Shea v. O'Shea* (15 P. D. 59). Disobedience of a solicitor is contempt of a criminal nature. The case, however, of a defaulting solicitor is certainly capable of being distinguished from that of *O'Shea v. O'Shea*, because the defaulting solicitor is committed, partly for the purpose of enforcing the order of the Court, and partly to punish him for his misconduct; whereas in the case of *O'Shea v. O'Shea*, the committal was simply punitive for the misconduct complained of, and nothing else. And it seems there is no appeal.

If the defaulter was a solicitor at the date of the order for payment, he is liable to attachment although he has ceased to be a solicitor before the attachment is applied for: *In re Strong* (32 Ch. D. 342). Solicitor ceasing to be such after order still liable.

London
agent of
country
solicitor.

A solicitor, the London agent of a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account of his agency; North, J., held that he was not liable to imprisonment under sub-section 4 of section 4 of the Debtors Act, 1869, as a solicitor ordered to pay in his capacity of an officer of the Court, but that he was liable to imprisonment under sub-section 3 of section 4 as a person acting in a fiduciary capacity as agent: *Litchfield v. Jones* (36 Ch. D. 530).

Balance
found due
by solicitor
on common
order for
taxation is
within sub-
section.

Default by a solicitor in payment of a balance found due from him upon taxation of his bill of costs under the common order for that purpose, is default in payment of a sum of money ordered to be paid by the solicitor in his character of an officer of the Court, within the meaning of the Debtors Act, 1869, s. 4, sub-section 4, and an attachment may be issued against him: *In re Rush* (L. R. 9 Eq. 147); *In re White* (19 W. R. 39). And where a solicitor was, as such, ordered to deliver up certain documents and to pay £10 and the costs of the application, and he had delivered up the documents and paid the £10 but not the costs, he was yet held, by the Court of Appeal, liable to remain in prison under an attachment for default in payment of the costs: *In re Freston* (11 Q. B. D. 545).

Also the
costs of
applica-
tion.

But not
where
the costs
are not
payable by
the solicitor
as an
officer of
the Court.

But where a solicitor in certain bankruptcy proceedings had been ordered to refund a small sum paid to him in excess for certain costs and to pay the costs of the application, and had paid the amount of excess of costs as ordered, but not the costs of the application, Cave, J., declined to make an order to attach him for not paying the costs of the application: *Ex parte Byrne, In re Apelt* (93 Sol. Journ. 366).

Lord Romilly, M.R., indeed, held in *In re Barfield and Rush* (19 W. R. 466), that this fourth exception authorized the issuing of an attachment not only against a solicitor from whom a balance was found due on a taxation of his bill, but also against a client from whom a sum was found due on taxation of his solicitor's bill if the client was himself a solicitor. But this decision must be taken to have been overruled by the decision of the Court of Appeal in *In re Hope* (L. R. 7 Ch. 528), holding, that a solicitor who has been ordered to pay costs simply as an unsuccessful litigant, is to be treated in the same way as any person in default for non-payment of costs, and is not liable to attachment. In *In re Hope* a common order was made against a solicitor for delivery of his bill of costs and taxation. He moved to discharge this order, and his application was dismissed with costs. He then appealed, and his appeal was also dismissed with costs. And it was held by the Court of Appeal (reversing the decision of Lord Romilly, M.R.), that the non-payment of the costs of the appeal was not a default in payment of a sum of money by a solicitor as an officer of the Court within the Debtors Act, 1869, s. 4, sub-s. 4, and that an attachment could not be issued against him. And see *per Hall, V.C.*, in *Tilney v. Stansfeld* (28 W. R. 582).

Where a solicitor as a litigant, and not in his character of solicitor, had by a consent order undertaken to pay certain costs and made default in so doing, it was held that a writ of attachment for the default could not be issued against him (*Farley v. Buckler*, the "*Times*," 30th October, 1893).

An order was made against A., a solicitor, under the Debtors Act, for payment of a sum of money by a certain

In re Barfield and Rush.

Over-ruled by *In re Hope.*

Solicitor under-taking to pay costs.

Arrangement modifying

terms of
order for
payment
excludes
power
of com-
mittal.

day, with notice, that in default, his property would be liable to sequestration and himself to be arrested and committed to prison, and was followed by the issue of a *fi. fa.*, under which the Sheriff took possession. An arrangement was subsequently made under which the Sheriff withdrew from possession, upon an engagement by A. to pay the amount, costs, charges, and interest, by monthly instalments, and in default that the Sheriff should have power to re-enter under the original order and proceed with the execution of the warrant as if he had not withdrawn from possession. Default having been made in payment of the instalments, it was held by Bacon, V.C.: That the arrangement for withdrawing from possession and payment by instalments was such an interference with the terms of the original order that A. could not be attached for default: *Harvey v. Hall* (L. R. 16 Eq. 324).

Solicitor
ordered to
pay costs of
frivolous
and vexa-
tious pro-
ceedings.

Where proceedings in an action had been stayed and the solicitor for the plaintiff ordered to pay the defendant's costs of it, as between solicitor and client, on the ground that the action was frivolous and vexatious, and an abuse of the process of the Court, and the solicitor made default in paying such costs, Hall, V.C., held that he was liable to be attached for their non-payment, and ordered a writ of attachment to issue against him, and also ordered him to pay the costs, as between solicitor and client, of the application and of the writ of attachment, but doubted whether the solicitor could be committed until payment of such last-mentioned costs: *Tilney v. Stansfeld* (28 W. R. 582).

Solicitor
cannot be
detained
for not
paying

The Vice-Chancellor appears to have been right in thinking in this case that the solicitor could not be committed for not paying the costs of the motion for

attachment: see *In re Hope* (L. R. 7 Ch. 523); *Jack-son v. Mawby* (1 Ch. D. 86); *Micklethwaite v. Fletcher* (27 W. R. 793), and *In re Hind, Ex parte Sharpe* (37 L. T. 168). costs of application to commit.

An attorney having brought an action without any authority from the plaintiff to do so, was ordered to pay the costs of the action, and it was held that his liability to pay such costs was a liability incurred by means of a fraud within the 49th section of the Bankruptcy Act, 1869: *Jenkyns v. Fereday* (L. R. 7 C. P. 358). Solicitor ordered to pay costs of action brought without authority.

A solicitor received on behalf of a client £389, which he paid into his account with his own bankers, and dealt with as his own money. He afterwards forwarded to his client £100, and refused to pay the balance on the ground that he had a claim against an agent whom his client had employed to communicate with him. Application having been made to the Queen's Bench Division to compel the solicitor to pay the money, the matter was referred to a master, who reported that the balance was due from the solicitor to his client. An order was then made by a Divisional Court, and a subsequent order was also made at Chambers that the solicitor should pay the balance claimed to his client. These orders not having been complied with, an order for the attachment of the solicitor was made by a Judge at Chambers; it was held upon appeal by the Court of Appeal (explaining *In re Ball*, L. R. 8 C. P. 104, and following *In re Freston*, 11 Q. B. D. 545), that the orders for the payment of the balance claimed were not merely in the nature of civil process, but were orders made against the solicitor as an officer of the Court, and that the attachment was properly granted (*In re Dudley*, 12 Q. B. D. 44). Order for payment of balance in solicitor's hands of client's moneys may be enforced by attachment.

Attachment may issue against solicitor after judgment recovered for the amount.

A client obtained judgment against his solicitor for a balance of £156, money recovered by the solicitor for the client. Execution on the judgment proved fruitless, the solicitor having assigned all his goods by bill of sale. It was held (overruling *Re Corbett Davis*, 15 L. T., N. S., 161, 15 W. R. 46) that the Court in its jurisdiction over solicitors for breach of their professional duty had power to make an order enforceable by attachment for payment of the money, notwithstanding that judgment had been obtained against him for the amount (*In re Grey* [1892], 2 Q. B. 440; following *In re Dudley*, *supra*).

Pending summons to vary certificate of taxation.

An order for a writ of attachment against a solicitor was directed to issue (but to lie in the office for a fortnight) for disobedience to an order to pay a sum consisting partly of taxed costs, although a summons to vary the certificate of the result of the taxation had been issued, and was pending (*In re Fassett, Wells v. Dearle*, 31 Sol. Journ. 797, affirmed on Appeal, 32 Sol. Journ. 129).

Subsequent bankruptcy of solicitor.

The Court has jurisdiction to attach a solicitor for default, in payment of a sum of money which he has been ordered to pay in his character of an officer of the Court, although he has subsequently become a bankrupt, and notwithstanding the provisions of section 9 of the Bankruptcy Act, 1883 (*In re Wray*, 36 Ch. D. 138; *In re Edye*, 39 W. R. 198).

Rules of Court as to sec. 4 of Debtors Act.

Rules of Court were made on the 7th of January, 1870, under the Debtors Act, with regard to the working of the sections of that Act; but those rules, although not expressly repealed, appear to be superseded by the Rules of the Supreme Court now in force.

Form of

The order for payment by the solicitor, or the evidence

to support any application to enforce it, must shew that the 4th sub-section of the Debtors Act applies to the case (*Brewster v. Prior*, 3 Times L. R. 590). ^{order to pay, &c.}

No order for discharge from custody, after the expiration of the year mentioned in the Act, is necessary, as ^{Order for discharge.} the writ of attachment, or the order of committal, is now expressed, so as not to authorize imprisonment thereunder for any longer period than one year.

CHAPTER VIII.

IMPRISONMENT FOR OFFENCES WITHIN THE EXCEPTIONS
TO THE DEBTORS ACT, 1869—*continued.**(Section 5.—Judgment Debtors.)*

THE abolition of imprisonment for debt effected by the Debtors Act, 1869, is also subject to certain exceptions, which are defined by the 5th section of that Act as follows:—

Debtors
Act, 1869,
s. 5.

“ Subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent Court.

“ Provided—(1) That the jurisdiction by this section given of committing a person to prison shall, in the case of any Court other than the Superior Courts of law and equity, be exercised only subject to the following restrictions ; that is to say :—

“ (a) Be exercised only by a Judge, or his deputy, and by an order made in open Court, and shewing on its face the ground on which it is issued.

“ (b) *Be exercised only as respects a judgment of a Superior Court of law or equity, when such judgment does not exceed fifty pounds exclusive of costs.*

[Repealed by the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 169; and sect. 103, sub-s. 4, of the same Act, which expressly gives the County Courts jurisdiction although the judgment exceeds £50, substituted.]

“(c) Be exercised only as respects a judgment of a County Court by a County Court Judge, or his deputy.

“(2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has, or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

“Proof of the means of the person making default may be given in such manner as the Court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules.

“Any jurisdiction by this section given to the Superior Courts may be exercised by a Judge sitting in Chambers, or otherwise, in the prescribed manner.

“For the purposes of this section any Court may direct any debt due from any person, in pursuance of any order or judgment of that or any other competent Court, to be paid by instalments, and may from time to time rescind or vary such order.

“Persons committed under this section by a Superior Court may be committed to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*, and every order of committal by any Superior Court shall, subject to the prescribed rules, be

issued, obeyed, and executed in the like manner as such writ.

“This section, so far as it relates to any County Court, shall be deemed to be substituted for sections ninety-eight and ninety-nine of the County Court Act, 1846, and that Act and the Acts amending the same shall be construed accordingly, and shall extend to orders made by the County Court with respect to sums due in pursuance of any order or judgment of any Court other than a County Court.

“No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt, or demand, or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.

“Any person imprisoned under this section shall be discharged out of custody upon a certificate signed in the prescribed manner to the effect that he has satisfied the debt, or instalment of a debt, in respect of which he was imprisoned, together with the prescribed costs (if any).”

Former
rules of
Court
obsolete.

The power conferred by this section was formerly exercised by the Court of Chancery, subject to certain rules contained in a General Order, dated 7th January, 1870; by the Courts of Law at Westminster under certain rules of Michaelmas Term, 1869; and by the Probate Court under certain General Rules of 1870. These several rules, although not expressly repealed, have been virtually repealed, or for practical purposes have become obsolete; and the jurisdiction of the High Court under this section has now, by order of the Lord Chancellor, under sect. 103, sub-sect. 1, of the Bankruptcy Act, 1883, been transferred to the Judge and Registrars of the

Jurisdic-
tion trans-
ferred to
bank-
ruptcy.

High Court sitting in Bankruptcy ; and it has been and is now provided by Rule 361 of the Bankruptcy Rules, 1886, that the County Court Rules for the time being in force as to the committal of judgment debtors shall, with any necessary modifications, apply to all Courts exercising jurisdiction under sect. 5 of the Debtors Act, 1869.

Order xxv. of the County Court Rules, 1889, contains the rules regulating the practice with respect to judgment summonses for orders of commitment under sect. 5 of the Debtors Act, 1869. These rules will be found set forth, and the practice thereunder stated with forms, in the Annual County Courts Practice, by Messrs. Nicol & Heywood. As this practice is peculiar to Bankruptcy and the County Courts, and the Supreme Court in the exercise of its ordinary jurisdiction does not interfere with it, these rules and forms are not here set forth ; nor is the practice under the 5th section of the Debtors Act dealt with ; nor all the cases decided upon that section cited. This practice and the decisions under the section will be found fully dealt with and collected in the Annual County Courts Practice, and in the several works upon the practice in Bankruptcy.

The Debtors Act, 1869, also contains (see Part II. of the Act) various provisions for the punishment criminally of fraudulent debtors for various offences specified therein, and which it is thereby enacted shall in some cases be deemed misdemeanours, and in others felonies ; but these matters do not come within the compass of this work.

A debtor is entitled to be heard upon the question of his ability to pay, and therefore when on a judgment summons a County Court Judge in the absence of the debtor through ill-health (of which there was a medical certificate which had been unquestioned) had made an

County
Court
practice
under
s. 5 of
Debtors
Act.

Provisions
of Debtors
Act for
punish-
ment of
fraudulent
debtors.

Debtor
must be
heard as to
his ability
to pay.

order for his committal for non-payment, a prohibition was granted by the Divisional Court: *Pitcher v. Bourn* (10 Times L. R. 245).

Appeal in
bank-
ruptcy to
Court of
Appeal.

An appeal from an order of the Judge having jurisdiction in bankruptcy respecting the commitment of a judgment debtor, must be made to the Court of Appeal and not to the Divisional Court (*Genese v. Lascelles*, 13 Q. B. D. 901).

Order with-
out proof
of means.

An order for *payment* may be obtained without proof of means (*Dillon v. Cunninghame*, L. R. 8 Ex. 28).

Married
women re-
strained
from antici-
pation
cannot be
committed.

A married woman restrained from anticipation cannot be committed for non-payment of a debt and costs if the only evidence of her ability to pay is that she has received income of property which she is restrained from anticipating (*Draycott v. Harrison*, 17 Q. B. D. 147).

What are
"debts"
within Act.
Costs.

Costs which the debtor has been ordered to pay by the Court constitute a debt within the Act (*Hewitson v. Sherwin*, L. R. 10 Eq. 58), as do arrears of alimony (*Linton v. Linton*, 15 Q. B. D. 239).

County
Court
enforcing
High Court
order.

Where the High Court has simply made an order for the payment of costs, or given judgment for payment of a sum of money, a County Court can enforce the order or judgment by directing payment by instalments. But if the High Court has already made such an order, it cannot be varied or rescinded by the County Court (*Re Ives, ex parte Addington*, 16 Q. B. D. 665).

Amount of
debt im-
material.

The amount of the debt is immaterial if the debtor has the means of paying (*Re Imperial Credit Association, Lewis's Case*, 42 L. J. Ch. 379).

Court of
Appeal
slow to
interfere

As a general rule the Court of Appeal will not interfere where the Judge has been satisfied of the debtor's ability to pay (*Esdaile v. Visser*, 13 Ch. D. 421; *Harper*

v. *Scrimgeour*, 5 C. P. D. 866); but if satisfied upon fresh evidence that he has no means, his discharge may be ordered (*Chard v. Jervis*, 9 Q. B. D. 178).

It is not necessary that the debtor should have had means to pay the whole of the debt (*Ex parte Fryer, In re Fryer*, 17 Q. B. D. 718); or that the "means to pay" should have been derived from earnings (*Ex parte Koster, In re Park*, 14 Q. B. D. 597).

An anticipatory order for committal in respect of future default in payment of instalments is invalid; but an order of commitment in respect of past defaults, coupled with a direction that the warrant should be suspended if the debtor pays instalments of a fixed amount for the future, is valid (*Stonor v. Fowle*, 13 App. Ca. 20).

It has been stated that the recent Commission of Inquiry into the Administration of the Debtors Act has decided to report that in future no order of committal ought to be made under sect. 5 of the Act for a longer period than three weeks, in place of the six weeks mentioned in the Act as the maximum period; thus reducing the period by one half.

CHAPTER IX.

PROCEDURE AND PRACTICE UPON APPLYING FOR COMMITTAL
OR ATTACHMENT FOR CONTEMPT.

Practice in
Crown
Office not
dealt with. IN here considering the procedure and practice of the Court in cases of contempt it is not proposed to deal with the practice of the Crown Office in such cases, but only with the practice of the High Court with regard thereto in the exercise of its ordinary *civil* jurisdiction. The jurisdiction dealt with in the Crown Office is in its nature *criminal*. Attachments only issue from the Crown Office when they arise out of the Crown Side proceedings, to which Order 44 of the R. S. C. does not apply. As to the practice of the Crown Office in cases of attachment, see the Practice on the Crown Side by Short and Mellor, chap. xiv.

Contempt
before the
Court itself
punished
summarily. For contempt of Court by any person perpetrated before the Court itself, the offender may be ordered to be forthwith removed by the ushers, or other officers, from the Court, or may be then and there fined in such an amount as the presiding Judges or Judge may think proper, or may be ordered to stand committed to prison for such a period as the presiding Judges or Judge may see fit to direct; or, in an extreme case, may be ordered to be both fined and imprisoned if thought necessary. He may also be ordered to find sureties for good

behaviour. An order for removal from the Court when pronounced is forthwith acted upon and enforced, and need not be drawn up.

An order or warrant for fine or imprisonment (or for both) for the offence, is at once drawn up—if it be for a fine, the fine is thereby ordered to be forthwith paid by the offender into the Exchequer, and the payment can be enforced as a Crown debt—if it be for imprisonment, the offender is then and there arrested by the tipstaff, or other officer in attendance upon the Court, and forthwith conveyed to prison by virtue of the order. As to the office of tipstaff, see *G. v. L.* [1891], 3 Ch. note (1), Tipstaff. p. 128. See Forms at end of Appendix A.

Where the Court itself takes notice of a contempt in the absence of the contemnor, he will be ordered to attend the Court personally, and to shew cause why he should not stand committed for his contempt: *Martin's Case* (2 Russ & M. 674). And see the form of order made in that case, merely ordering payment by him of the costs upon the humble submission of the contemnor, who was Mayor of Great Yarmouth.

There must not be imparted into proceedings for contempt any matter not strictly evidence against the person sought to be punished, nor ought the Judge to permit any such matter to be laid before him (*In re a special Reference from the Bahama Islands* [1893], A. C. 138).

At the expiration of the period mentioned in the order for the imprisonment of the offender he will be discharged from custody without any order for the purpose; but if no period for the imprisonment is mentioned in the order (as in *In re Evans, Evans v. Noton*, W. N., 1898, p. 82); or if it is desired to obtain a discharge from

Bench
order or
warrant.

Proceeding
where
Court itself
notices a
contempt.

Strict
evidence
only per-
mitted.

Discharge
of offender
from
prison.

custody before the expiration of the period mentioned, an application for discharge from custody should be made to the Court or Judge by whom the committal was ordered, on behalf of the person in custody, who will not be discharged from custody without making his humble submission and apology to the offended Court or Judge; and if the health of the person in custody is suffering by the confinement the application for release should be supported by evidence to that effect. Forms of notices of motion for discharge from custody will be found in Appendix B.

Forms
for release
from cus-
tody.

Remedy by
habeas
corpus.

It would seem that a person committed (if the committal was right in law) would have no remedy by writ of *habeas corpus*, because the order of committal would be a good answer to the writ upon its return. However, if the commitment is bad in law, or even in form, the prisoner may be discharged upon *habeas corpus*. *Hammond v. Howell* (1 Mod. 184). A writ of *habeas corpus* was applied for unsuccessfully in *Ex parte Fernandez* (10 C. B., N. S., 9). See also *In re Clarke* (11 L. J. Q. B. 75).

When
special
application
for punish-
ment
necessary.

In all cases of contempt, except such as are perpetrated in the face of the Court or against the Court, the offender can only be committed to prison, or otherwise punished for the offence, upon an application made to the Court for the purpose, after due notice thereof.

Corpora-
tions
punished
by seques-
tration.

In the case of a Corporation disobeying an order of the Court, the remedy is by writ of sequestration against all the property and effects of the Corporation; or by attachment against the directors or other officers thereof privy to the contempt. Leave to issue a sequestration or attachment must be obtained from the Court or a

Judge (R. S. C., Order XLII., rule 31), and such leave must be applied for upon notice in the usual way.

Sequestration was ordered to issue where a Corporation disobeyed an injunction restraining them from causing or permitting sewage to pass through drains under their control into a river (*Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42, and cf. cases cited Seton 5th ed., 633-4). Injunctions enforced against corporations by sequestration.

But directors, managers, or other officers of a Corporation privy to or aiding or abetting a contempt by such Corporation may be made responsible therefor; *Ex parte Green & Others, In re Press Association* (7 Times L. R. 411; *Lewis v. Pontypridd, &c., Co.*, 11 Times L. R. 203). Liability of directors, &c., for contempt of Corporation.

A writ of sequestration would seem to issue without leave against individuals to enforce orders; except, perhaps, orders to do or abstain from doing any act other than the payment of money (see R. S. C., Order XLII., rule 6), "Sequestration unquestionably was and "is a process to punish contempt. Sequestration was "issued to compel a man formerly to put in an answer "and the like, and sequestration also went to compel "(in the words of Lord Hardwicke) a defendant to "perform a duty such as the payment of money, and "such of course as the payment of money into Court" (*per Chitty, J., in Pratt v. Inman*, 43 Ch. D. at p. 179). Sequestration against individuals.

The death of a person does not discharge a sequestration issued against him where it has issued to compel the performance of a duty by such person, and in that case the proceedings under the writ of sequestration may be continued against the legal personal representative of such person; but where it issues merely to compel an answer death discharges the writ (*Hyde v. Greenhill*, 1 Dick. 106, and *Pratt v. Inman*, *supra*). In Successive Death of person against whom sequestration issued.

writs of sequestration not to issue against married woman restrained from anticipation. the case of a judgment debtor being a married woman possessed of property the income of which she is restrained from anticipating, successive writs of sequestration will not be ordered to issue, as a subsequent writ will not affect anything which the first does not affect (*In re Lumley, Ex parte Cathcart* [1894], 3 Ch. 135).

Sequestration not execution. Sequestration is not an execution in either form or substance; it is founded on default of performance of the decree of the Court, and does not give any right in the funds levied to the person at whose instance it is sued out (*Brune v. Robinson*, 7 Ir. Eq. R. 188).

Writ operates in rem. The writ operates *in rem* and not *in personam* (*Tatham v. Parker*, 1 Sm. & G. 506).

Effect of sequestration. Sequestration dates from the time of the issue of the writ (*Burdett v. Rockley*, 1 Vern. 58). A purchaser for value without notice of a chose in action would however not be deprived of priority merely by the issue of the writ (*Ex parte Nelson, Re Hoare*, 14 Ch. D. 41; *Daniel Ch. Practice*, 6th ed., 918).

Property liable to sequestration. The following classes of property have been held liable to sequestrations. Rents and profits of real estate (*Hyde v. Greenhill*, Dick. 107); all personal estate (*ib.*); a rent-charge (*Wilson v. Metcalfe*, 1 Beav. 263); choses in action (*ib.*), dividends accrued at the date of the judgment to which a married woman restrained from anticipation is entitled (*Claydon v. Finch*, L. R. 15 Eq. 266; *In re Lumley, Ex parte Hood Barrs* [1894], 3 Ch. 133; *Bryant v. Bull*, 10 Ch. D. 153; *Hood Barrs v. Cathcart* [1894], 2 Q. B. 559); but not future dividends (*Hyde v. Hyde*, 13 P. D. 166); it extends to pensions for past services (*Dent v. Dent*, 1 P. & M. 366; *Willcock v. Terrell*, 3 Ex. D. 923); and to a sum

received in commutation of a pension (*Crowe v. Price*, 22 Q. B. D. 429); but not to the salary of an equerry (*Fenton v. Lowther*, 1 Cox, 815); or the pay or half-pay of an officer (*Apthorpe v. Apthorpe*, 35 W. R. 728; *Birch v. Birch*, 8 P. D. 168). And see also on this subject Seton, 5th ed., pp. 395-6.

Sequestrators may break open doors in discharge of their office (*Lowten v. Mayor of Colchester*, 2 Mer. 395); and if keys are denied them, may be allowed to open boxes that are locked (*Lord Pelham v. Duchess of Newcastle*, 3 Swan. 290 n.). It has been doubted whether the books and papers of a Corporation could be seized by sequestrators upon mesne process (*Lowten v. Mayor of Colchester*, *supra*). Where goods are taken upon mesne process they are only taken as a pledge to prevent the person from enjoying them till he has purged his contempt. It is doubtful if a sale can take place of goods thus taken, except for the purpose of paying expenses (*Hales v. Shaftoe*, 1 Ves. Jun. 86).

Sequestrators who take upon themselves without leave to remove or sell goods taken, may be liable to be attached (*Desbrow v. Crommie*, Bunb. 272).

Application for leave to sell should be made to the Court by motion or summons upon notice (*Mitchell v. Draper*, 9 Ves. 208). If service is impossible, *e.g.* if the party has gone out of the jurisdiction, the application may be made *ex parte* (*Re Rush*, 18 W. R. 417).

Where lands have been taken authority to let the property may be given (*Neale v. Bealing*, 3 Swan. 304 n.); but not if the sequestration issued upon mesne process (*Ray v. —*, *ib.* 306 n.).

For form of writ of sequestration, see Form in Forms.

Appendix B.; and for forms of orders for sequestration, see Seton, 5th ed., 892).

Leave must be obtained to issue writ of attachment.

Formerly a writ of attachment might, in certain cases, issue without leave, but now no writ of attachment can be issued without the leave of the Court or a Judge applied for on notice to the party against whom the attachment is sought (R. S. C., Order XLIV., rule 2). The former practice of applying for leave in certain cases to issue the writ *ex parte* is abolished.

Application to commit should be to Court.

An application to commit, whether in the Chancery Division or the Queen's Bench Division, should be made by motion in open Court and not in Chambers.

In Chancery application for attachment in general in Court.

It has been decided by the Court of Appeal that in the Chancery Division an application for leave to issue a writ of attachment is not properly made by summons in Chambers, but should be made in open Court by motion (*Davis v. Galmoye*, 39 Ch. D. 822, approved *Re B.* 40 W. R. 369). Under the Companies Winding-up Rules, 1892, R. 3, sub-sect. (d) applications for the committal of any person to prison for contempt must be heard before the Judge in open Court.

But the order may be made in Chambers.

The rule of the High Court that applications to imprison should be made to the Court is not an absolute rule so as to deprive a Judge of jurisdiction (Judicature Act, 1873, sect. 39) to make the order in Chambers, but any order for imprisonment should be made by the Judge personally: *per* North, J., in *Davis v. Galmoye* (40 Ch. D. 355). However, Bacon, V.C., held (*In re Knight*, W. N., 1883, p. 162) that an order for attachment will not be made in Chambers; it is therefore safer in the Chancery Division to apply by motion in Court for leave to issue a writ of attachment.

Practice in

In the Queen's Bench and Probate Divisions, the

practice prevails of applying upon summons in Chambers for leave to issue a writ of attachment ; but the summons cannot be heard by a Master in the Queen's Bench Division, or by a Registrar in the Probate Division : R. S. C., Order LIV., rule 12, sub-sec. (a). The practice of applying in the Queen's Bench Division in Chambers for a writ of attachment, appears to be founded only upon the case of *Salm Kyrburg v. Posnanski* (13 Q. B. D. 218) (decided by Grove, J., and Huddleston, B. ; Day, J., dissenting) ; followed, to some extent, by Huddleston, B., and Wills, J., in *Amstell v. Lesser* (16 Q. B. D. 187).

In all cases of importance (whatever the Division), the best course is to apply by motion to the Court, notice of which has been duly served, for leave to issue a writ of attachment.

Queen's
Bench and
Probate
Divisions.

In im-
portant
cases appli-
cation
should be
to Court.

Great care should be observed in drawing up and serving any judgment or order for disobedience to which it is intended to make an application to commit, or for attachment, or for a sequestration against a Corporation. The judgment or order should clearly state or define the act to be done or prohibited, and in the case of a sum of money or stock to be paid or transferred, the amount should be mentioned, which should not be made to consist of any sum (such as interest, &c.) for the non-payment of which the person in default cannot be imprisoned, and it should be stated whether the amount is cash or stock, and a time should be fixed by the judgment or order for the payment or for the doing any other act (R. S. C., Order XLII., rule 5). It is not, however, necessary in the case of an order to pay costs to limit a time within which the costs must be paid before getting leave to issue a sequestration to enforce their payment (*In re Lumley*, 42 W. R. 401). The

Precau-
tions to be
observed in
drawing up
and serving
order.

judgment or order, moreover, should be served before the fixed time expires, for otherwise subsequent proceedings for attachment or committal could not be taken: *Duffield v. Elwes* (2 Beav. 268); *Adkins v. Bliss* (2 De G. & J. 286); and in order to avoid any risk of failure on this ground there should be inserted in the judgment or order after the words fixing the time, the words "or subsequently within four days after service of this order." But if not served within the time fixed a supplemental order extending the time can be got: *Needham v. Needham* (1 Hare, 633); *Treherne v. Dale* (27 Ch. D. 66). But if the original order has been made by consent, an order enlarging the time for doing the act therein mentioned can only be got by consent also: *per* North, J., in *Australasian, &c., Company v. Walter* (W. N., 1891, p. 170). It is doubtful whether "forthwith" is a sufficient expression of time; Lord Romilly, M.R., held that it was: *Thomas v. Nokes* (L. R. 6 Eq. 521); but Jessel, M.R., in the Court of Appeal, doubted it: see *Gilbert v. Endean* (9 Ch. D. at p. 266). There can be no default until the order is served where it directs payment after its service: *Colverson v. Bloomfield* (29 Ch. D. 341).

Service of
judgment
or order.

The judgment or order should be served on the party personally: *In re Cunningham* (55 L. T. 766); except in the case of an order for interrogatories or discovery or inspection, which is sufficiently served if served on the solicitor of the party against whom it is made (R. S. C., Order xxxi., rule 22), or for production and inspection: *Joy v. Hadley* (22 Ch. D. 571). After service of the order it is no excuse for the party served to plead ignorance of its contents because he did not read it: *In re Witten* (4 Times L. R. 36). If it be made to appear to a Court or

Substi-

a Judge that prompt personal service of the judgment ^{tuted} or order cannot be effected, the Court or Judge may ^{service.} make an order for substituted or other service of the order, or for the substitution of notice of the order for service thereof (R. S. C., Order LXVII., rule 6). Substituted service may be directed of an order enforceable by attachment as well as of any other order: *Whyte Melville v. Whyte Melville* (4 Times L. R. 491).

Where any person is by any judgment or order directed to pay any money, or to deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof; but the person so directed shall be bound to obey such judgment or order upon being duly served with the same, without demand (R. S. C., Order XLII., rule 1). ^{Not necessary to demand obedience to order.}

In order to obtain leave for substituted service of an order it should be shewn that the person to be served is purposely keeping out of the way, and that ineffectual attempts have been made to personally serve the order: *In re Lloyd* (10 Beav. 451); *Roby v. Scholes* (1 W. R. 118); *Skegg v. Simpson* (2 De G. & S. 454); and see *In re Steele* (23 Sol. Journ. 906). But if the order has come to the knowledge of the offender it may perhaps be enforced without personal or other service: *Allen v. Allen* (10 P. D. 187); *Hyde v. Hyde* (13 P. D. 166). ^{Substituted service when directed.}

Upon the copy of the judgment or order served must be indorsed the following memorandum, viz. :—"If you, the within-named A. B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)."—(R. S. C., Order XLI., rule 5; and see Appendix B., No. 2). This rule is not confined to cases in which ^{Indorsement on order.}

personal service of the order is required, but extends to cases where service may be effected on a solicitor: *Hampden v. Wallis* (26 Ch. D. at p. 758); but the memorandum need not be indorsed upon copies served of judgments or orders merely prohibitive: *Selous v. Croydon Local Board* (53 L. T. 209, *Hudson v. Walker*, W. N., 1894, 180), nor need it be indorsed upon the copy served of an order merely extending the time for doing an act already ordered to be done: *Treherne v. Dale* (27 Ch. D. 66); the indorsement is sufficient, although not in the words given by the rule, if it be to the same effect: *Treherne v. Dale* (*supra*). The proceedings for attachment or committal will fail for want of this indorsement on the copy judgment, or order served: *Hampden v. Wallis* (26 Ch. D. 746, *In re Bristow*, 66 L. T. 60, and *Pace v. Pace*, 67 L. T. 388). A citation issued to bring in a probate should have the memorandum indorsed if it is desired to enforce the citation by attachment (*Evans v. Evans*, 67 L. T. 719). And see *Shurrock v. Lillie* (4 Times L. R. 355) where an attachment was set aside with costs because (*inter alia*) this memorandum had not been indorsed on the copy order served. The affidavit of service of the order must prove that the memorandum was endorsed, *Stockton, &c., Co. v. Gaston* [1895], 1 Q. B. 453; W. N., 1895, p. 10.

Production
of dupli-
cate order
at time of
service.

The duplicate order (the original is now filed, R. S. C., Order LXII., rule 2) should be shewn at the time of the service, but, except in the case of an order for attachment, it is not necessary to regular service that the duplicate order be shewn if an office copy be exhibited (R. S. C., Order LXVII., rule 1). A form of affidavit of service will be found in Appendix B. An exact copy of the judgment or order in all its material particulars

must be given to the person served, or the service will be ineffectual, and no proceedings thereon for attachment can be taken (*In re Holt*, 11 Ch. D. 168).

In order to justify committal for breach of an injunction it is not necessary that the order granting the injunction should have been served upon the party against whom the injunction has been granted, if it be proved that he had notice of the order *aliunde* (*Kimpton v. Eve*, 2 V. & B. 350), and knew that it was intended to be enforced; and this rule is not limited to cases in which a breach is committed before there has been time to get the order drawn up and entered; but delay in endeavouring to complete and serve the order may justify the assumption that it has been abandoned, and the Court will not in such a case treat the defendant as in contempt for a breach, although he was present in Court upon the hearing of the motion (*Van Sandau v. Rose*, 2 J. & W. 264; *James v. Downes*, 18 Ves. 522; *United Telephone Company v. Dale*, 25 Ch. D. 778). Notice of order without service sufficient in case of injunction. ←

Thus, if the party against whom the injunction is sought be present in Court when the order is pronounced, or when the motion is made, though he leave before the order is pronounced (*Osborne v. Tennant*, 14 Ves. 136; *Kimpton v. Eve*, *supra*), or if he consent to the order, or have notice of it by telegram or reports in newspapers or otherwise (*Kimpton v. Eve*, *supra*; *Ex parte Langley*, 13 Ch. D. 110; *Avory v. Andrews*, 30 W. R. 564; *United Telephone Company v. Dale*, *supra*), it will be sufficient, and the party disregarding the injunction will be liable to committal, although the order granting it has not been drawn up or served, provided there has been no great delay in endeavouring to get it drawn up and served.

Notice of
motion to
commit
must be
personally
served.

If the application be to commit for disobedience to the judgment or order, the notice of motion to commit must be personally served (*Angerstein v. Hunt*, 6 Ves. 488; *Ellerton v. Thirsk*, 1 J. & W. 376; *Hope v. Carnegie*, L. R. 7 Eq. 254; *Nelson v. Worssam*, 25 L. J. Notes of Ca. 151, and W. N., 1890, p. 216). And see *Mander v. Falcke* [1891], 3 Ch. 488, where Kekewich, J., finally decided (following Stirling, J.) that a notice of motion to commit must be personally served. Appearing upon the motion, and at once taking objection to the regularity of the service, is not a waiver of the irregularity, and committal will not be ordered (*Ellerton v. Thirsk*, *Nelson v. Worssam*, and *Mander v. Falcke*, *supra*); but the objection may be waived by appearing and consenting to an adjournment of the application without then and there taking it, and it will then be too late to take the objection upon the adjourned hearing (*In re Alcock*, 1 C. P. D. 68); or by appearing and not taking the objection (*Treherne v. Dale*, 27 Ch. D. 66). But when all reasonable efforts to effect personal service of a notice of motion to commit have been made and failed, the Court can and ought to grant an order for substituted service of a notice of motion to commit (*per* Kekewich, J., in *Mander v. Falcke*, 35 Sol. Journ., 697, and see *Re Luxmore*, W. N., 1888, p. 63). The order for substituted service is made *ex parte* (*In re a Solicitor*, W. N., 1892, p. 22). Service of an order to shew cause why a person should not be ordered to stand committed by leaving the same at his dwelling-house was directed to be good service, and subsequently the person was ordered to stand committed upon an affidavit of service of the order by *throwing it into his dwelling-house* (*Williams v. Johns*, 1 Mer. 303).

Substi-
tuted
service of
notice of
motion to
commit.

If the application be for leave to issue a writ of attachment for disobedience to a judgment or order it seems that the notice of motion need not be personally served, but is sufficiently served if served upon the solicitor on the record of the party in default (*Browning v. Sabin*, 5 Ch. D. 511; *Joy v. Hadley*, 22 Ch. D. 571; *Re Davis*, W. N., 1887, p. 252), or by leaving the same at the residence of the party concerned (*In re a Solicitor*, 14 Ch. D. 152, and *sub. nom. In re Ryan*, 28 W. R. 529), or if his private residence cannot be found, then at his place of business (*Tilney v. Stansfeld*, 28 W. R. 582). An order may if necessary be got for substituted service of a notice of motion to attach (*Howarth v. Howarth*, 11 P. D. 95). If the party in default has not entered an appearance at the Central Office, the notice of motion for leave to issue a writ of attachment against him is sufficiently served by filing it with the proper officer pursuant to Order LXVII., rule 4 (*In re Morris*, *Morris v. Fowler*, 44 Ch. D. 151, approved by the Court of Appeal in *In re Evans*, *Evans v. Noton* [1893], 1 Ch. 252). But where the plaintiff evidently knew where to find the defendant, the Court declined to issue an attachment against the defendant on the mere filing of the notice of motion, but required personal service of it (*In re Bassett*, *Bassett v. Bassett* [1894], 3 Ch. 179). In *Mann v. Perry* (50 L. J. Ch. 251), Bacon, V.C., declined to order a writ of attachment to issue without personal service of the notice of motion, or without some evidence of a reason for not effecting such service. The Court may, if it thinks fit, insist upon personal service of a notice of motion for leave to issue a writ of attachment being effected where there is no difficulty about

Notice of motion for attachment need not be personally served.

Order for substituted service.

When no appearance entered, notice of motion may be filed.

But when address known it should be served.

Court may in all cases insist on personal service.

When respondent not a party to action, service should be personal.

personal service (*Howarth v. Howarth*, 11 P. D. 95; *Re Bassett, Bassett v. Bassett* [1894], 3 Ch. 179). Where the attachment is asked against some one who is not a party to the action, there the service must be personal, as he has no solicitor upon the record (*per* Cotton, L.J., in *Howarth v. Howarth*, 11 P. D. at p. 99).

Practice as to service should be made uniform whether it be committal or attachment.

It is submitted that the practice as to the service of notices of motion to commit, or for leave to issue a writ of attachment, ought to be made (as far as possible) uniform, and that Mr. Registrar Lavie draws the proper line in his Memorandum (see Appendix A.), when he says that the practice of permitting the service of notice of applications for leave to issue writs of attachment on the solicitor of the party to be attached should be limited to cases where the writ of attachment would, before the Judicature Act, have issued without leave, and that in all other cases (whether committal or attachment) the service of notice of the application should be personal.

Notice of motion for committal or attachment must state grounds of application.

A notice of motion for attachment must state in general terms the grounds of the application (R. S. C., Order LII., rule 4). A notice of motion for leave to issue a writ of attachment which does not state the grounds for the motion is irregular, and the motion will be refused (*Taylor v. Roe*, 68 L. T. 213, W. N., 1893, p. 14). The same rule has always been applied to notices of motion to commit. It is, at any rate, convenient that the rules of practice applying to attachment and committal should be as far as possible the same. Where an order has been made for payment of a specified sum by a specified time, a notice of motion to attach "for default in obeying" the order was held by the Court of Appeal to sufficiently state the grounds

of the application within the rule (*Treherne v. Dale*, 27 Ch. D. 66).

If a motion for attachment is founded on evidence by affidavit, a copy of any affidavit intended to be used must be served with the notice of motion (R. S. C., Order LII., rule 4). It would seem that this rule applies to a motion to commit (*Litchfield v. Jones*, 25 Ch. D. 64). It is certainly safer on applying to commit to serve copies of the evidence with the notice of motion. And it is the safest course to specify in the notice of motion itself the evidence intended to be used to support it, *In re Dunning*, *Sturgeon v. Lawrence* (W. N., 1894, p. 140). It seems that the service of the evidence is sufficient if it is served two clear days before the return of the notice of motion, although not with it (*Hampden v. Wallis*, 26 Ch. D. 746; but see *Petty v. Daniel*, 34 Ch. D. 172). It is doubtful whether the rule as to serving the evidence applies to copies of affidavits relating to procedure, e.g. affidavits of service of the order, &c. (*Whitham v. Whitham*, W. N., 1885, p. 176; *Schirges v. Schirges*, *ib.* 1886, p. 85; *In re Lysaght*, *ib.* 1887, p. 23; *Evans v. Evans*, 67 L. T. 719), or whether the rule extends to copies of exhibits (*In re Hutchings*, W. N., 1887, p. 254). In *In re a Solicitor* (W. N., 1893, p. 188), Stirling, J., made an order to commit a solicitor not appearing, and who had not been served with a copy of the affidavit proving service on him of the order not obeyed. But in *In re Dunning*, *Sturgeon v. Lawrence* (W. N., 1894, p. 140), where the defendant appeared and took the objection, Kekewich, J. (following *In re Lysaght*, *supra*), held that an affidavit proving service of the order must be served with a notice of motion to attach; as an order cannot be enforced until it is

served. The evidence served with the notice of motion should be sufficient to establish at least a *prima facie* case for committal or attachment, and if it does not, it is conceived that the application must fail, and that leave to supplement the evidence would not be given. It is irregular not to serve with a notice of motion for attachment copies of the affidavits intended to be used on the motion, and the copy affidavits and the notice of motion should be served together, and if not served personally they should be served at the address for service (*Petty v. Daniel*, 34 Ch. D. 172). A motion for leave to issue a writ of attachment was refused with costs on the ground that no affidavits had been served with the notice of motion, and that the notice of motion did not state the grounds for the motion (*Taylor v. Roe*, 68 L. T. 213, W. N., 1893, p. 14). The service of the affidavits may be waived; the mere fact of failure to serve copies of the affidavits is not necessarily and in all circumstances fatal to the application: *per* Court of Appeal, in *Rendell v. Grundy* ([1895], 1 Q. B. 16).

The affidavits to support must be regularly sworn.

The affidavits must be regularly sworn. Where the affidavits in support of a motion to commit had been sworn before a country solicitor who was the "correspondent" of the plaintiff's London solicitor (in disregard of Order xxxviii., rule 16, of R. S. C.) the affidavits were held to be insufficient and ordered off the file, and a new notice of motion had to be served (*Parkinson v. Crawshaw*, W. N., 1894, p. 85).

Great strictness to be observed in the practice in all

Care should be observed in settling, serving, and proceeding upon a notice of motion to commit, or for leave to issue a writ of attachment, because the Court is "jealous of the personal freedom of the subjects of the

“Crown” (*per* Stuart, V.C., in *Hope v. Carnegie*, L. R. 7 Eq. at p. 260); and where the liberty of the subject is in question, always requires the utmost strictness in procedure (see *Hinde v. Blake*, 5 Beav. 481; *In re Holt*, 11 Ch. D. 168); applications affecting the liberty of the subject are matters *strictissimi juris* (*per* Kekewich, J., in *Taylor v. Roe*, 68 L. T. 213, W. N., 1893, p. 14); and although an irregularity in the course of proceedings for attachment or committal does not render the proceedings void, and the Court has power (R. S. C., Order LXX., rule 1) to condone the irregularity (*Petty v. Daniel*, 34 Ch. D. 172), yet slips in the practice, where the liberty of the subject is concerned, are seldom allowed by the Court to be got rid of under this power, and in many cases delay and expense have been incurred and even justice defeated, by slips and irregularity in the practice. A direct non-compliance with the rules of practice as to committal and attachment ought not to be condoned by the Court; and it would seem that the rule of *Petty v. Daniel* (*supra*) ought only to be applied where the person is (as was the case there) already in prison, and is seeking to get his release on the ground of an irregularity in the proceedings under which he got there. But in a proper case, and for the purpose of justice, and where valid reasons are given for it, an irregularity may be condoned (*Taylor v. Roe*, *supra*), or not permitted to be insisted upon: *Rendell v. Grundy* ([1895], 1 Q. B. 16).

It is much better for suitors that there should be no variation in the practice as to committal and attachment (*per* Kekewich, J., in *In re Dunning, Sturgeon v. Lawrence*, W. N., 1894, p. 140).

The notice of motion should be entitled in the cause

proceedings for committal or attachment.

Condoning any irregularity.

There should be no variation in the practice.

Form of

Notice of motion should ask for general relief.

The notice of motion should ask for such further or other order, as the circumstances of the case may require—"To express the extent of the prayer for general relief, I have often heard it said figuratively that it is the next best prayer after the Lord's Prayer, and that under it you may obtain any relief the case made on the pleadings and proofs will warrant" (*per* Lord Keeper Northington in *Manaton v. Molesworth*, 1 Eden, at p. 26). Although by R. S. C., Order xx.,

rule 6, the claim for general relief need not now be made in any statement of claim, it is still useful in a notice of motion; in practice it has been found to work well to have it there. The Court of Appeal has given relief not specifically asked by a notice of appeal under the alternative words "such an order as the Court may think right to give" (see *Midwinter v. Midwinter*, 40 W. R. at p. 34).

The rules of practice which apply to an application for leave to issue a writ of attachment apply also to an application for leave to renew the issue of such a writ (*Taylor v. Roe*, W. N., 1893, p. 14, 68 L. T. 213).

The affidavits to support the application should clearly prove the grounds upon which it is sought to commit or attach, or to sequester the property of the respondent to the motion. A form of affidavit to support the motion will be found in Appendix B. If the offence be default in obeying an order for the payment into Court of any cash, or for the transfer into Court of any stock, or for the deposit in Court of any deeds or documents, the default should be proved by the certificate of default of the proper officer of the Court (*Daniell's Chan. Prac.* 6th ed., p. 880, and *per Cotton, L.J.*, in *Treherne v. Dale*, 27 Ch. D. at pp. 69-70). But any objection on this subject is disposed of by appearing and not disputing the fact of non-payment (*per Baggallay and Cotton, L.JJ.*, in *Treherne v. Dale* (*supra*). The Court could, it is assumed, inform itself of the alleged default by inquiry of its officers as to how the facts stood with respect to it. There must not be imported into the case any matter not evidence against the party proceeded against (*In re a Special Reference from the Bahama Islands* [1893], A. C. 138).

Evidence as
to any
matter
within the
exceptions
to the
Debtors
Act.

If the application be grounded on the non-payment of money within the exceptions to the Debtors Act there should (unless the order for payment states it as a fact) be evidence to shew that the money in question is of a character to bring the matter within one or other of those exceptions. This may be proved by the old evidence in the cause, or by new evidence entered into on the application to imprison, or by a chief clerk's certificate in the cause, or even (it has been said) by the production of the notes of evidence taken in the cause by an official referee. If the offence be for disobedience to a judgment or order, there should also be an affidavit proving due service of the judgment or order. The person sought to be committed has the right to see and answer the applicant's evidence in reply (*Dodge v. Brown*, 24 Sol. Journ. 108).

Practice
in the
Chancery,
Queen's
Bench, and
Probate
Divisions.

In the Chancery Division the motion is moved before the Judge to whose Court the matter is attached, upon a motion day, according to the seniority of the counsel moving in the ordinary way; but in the Queen's Bench and Probate Divisions, the motion is entered in a list and comes on in its turn (unless for some reason it is marked "urgent") before the Court appointed to hear such motions. Upon hearing the motion the Court has the widest discretion to deal with it as it may think fit; either to make the order asked, or to adjourn the application on terms, or to give time for payment, or to order payment by instalments (in cases of contempt founded upon non-payment of money), or merely to order payment of the costs of the motion (which may be given between solicitor and client) without other punishment, or to accept an apology, or to dispose of the application in such other manner as may seem just.

Orders
made on
applica-
tions to
commit.

In the case of an order for sequestration against Corporations its operation is generally suspended for a period to enable the corporation to do the required act. It is conceived that after proceeding to enforce a judgment or order against any person by the issue of a writ of sequestration it is not competent subsequently to seek to enforce the same judgment or order against such person by committal or attachment, and that the proceedings by sequestration from their peculiar nature exhaust the remedy. However, a writ of attachment may be issued concurrently with a writ of sequestration by way of double execution (*Crone v. O'Dell*, 2 Moll 344). Sequestration.

It is an answer to the motion (where no direct contempt of Court is in question) that the party complaining of the contempt has waived it (*Daniell's Chan. Prac.*, 6th ed., p. 908), as by agreeing to take by instalments the money ordered to be paid in a lump sum, or by giving time for payment without reserving his rights, or otherwise. But waiver only applies where the contempt has arisen from breach of an order made in favour of any party—not, of course, to contempts of the Court itself. Waiver when an answer to the application.

If an order is made on the motion, the respondent to the motion is usually ordered to pay the costs of and incident to the application, including (in the case of attachment or sequestration) those of issuing and executing the writ of attachment or sequestration. The Court will sometimes give to the party moving by way of indemnity, costs as between solicitor and client, instead of or in addition to committing the respondent (*per* Court of Appeal in *Plating Company v. Farquharson*, 17 Ch. D. at p. 57; and see *Steele v. Hutchings*, W. N., 1879, Costs of application.

p. 18), but costs as between solicitor and client cannot, if the motion fails, be given to the respondent (*Plating Company v. Farquharson, supra*). The motion may be ordered to stand over with liberty to renew it if the costs be not paid (*Steele v. Hutchings, supra*); but (as has been already shewn) the respondent cannot be imprisoned until the costs be paid, nor can he be committed for non-payment of such costs where no order is made except that he do pay them (*Micklethwaite v. Fletcher, 27 W. R. 798*).

Appeal lies from order giving costs to the applicant. An appeal lies from an order that the respondent do pay the costs of the application, as it amounts to an adjudication of contempt and misconduct (*Witt v. Corcoran, 2 Ch. D. 69*; *Stevens v. Metropolitan District Rail-*

Costs given against applicant if application fails. *way Company, 29 Ch. D. 60*). If the application fails it will be refused with costs; but it is not usual to give costs where it fails upon a technical objection and not on the merits. It is both usual and proper to give costs against an unsuccessful applicant; for the extreme course of applying to commit or attach should not be resorted to unless the circumstances of the case justify it.

Conditional order for writ to issue. Leave may be given to issue a writ of attachment conditionally, as on not paying by instalments (*Blade v. Gray, 6 Jur. 587*); but it is not the practice to make a conditional order of committal.

Forms. Forms of orders for committal and of writs of attachment and sequestration will be found in Appendix B.

Order to commit should specify the contempt. An order for committal is bad if it does not specify in what particulars the person committed has been guilty of contempt, so as to enable him to purge it (*Reg. v. County Court Judge of Lambeth, 36 W. R. 475*). The order for commitment when drawn up should shew on its face the ground on which it is issued; but this does

not apply to the minute of the order made in the Court book before drawing it up (*Harris v. Slater*, 21 Q. B. D. 359).

In case of committal, the order is lodged with the tip-staff or other proper officer of the Court, who may at once arrest the offender thereon. When arrested, the prisoner is usually conveyed to Holloway Prison. In the case of a writ of attachment, the writ is sued out in the same way as any other writ of execution, and lodged with the Sheriff; the offender is arrested under it by the Sheriff, and is then lodged in the proper gaol of the bailiwick in which he may happen to be taken. In the case of a writ of sequestration against a Corporation, this writ is also sued out in the same way as an ordinary writ of execution, and directed to not less than four commissioners who execute the same.

A writ of attachment should not be enforced after notice that the contempt in respect of which it was ordered to issue has been cleared (*Gay v. Hancock*, 56 L. T. 726).

It is no objection to the issue of a writ of attachment, that another similar writ has previously issued against the same party which has not been acted on (*Andreus v. Walton*, 1 Phill. 619).

In a case of contempt in not complying with an order to deliver over deeds, it has been held that the officer charged with the execution of the writ may break open the outer door of the party's house in order to execute it (*Harvey v. Harvey*, 26 Ch. D. 644). And it seems that in all cases where the order for a committal or for a writ of attachment is made by reason of any wilful contempt or contempt criminal in its nature (and not merely as a civil process to enforce a judgment in favour of a party),

Enforcing
order and
issuing
writ.

Writ not
enforced if
contempt
cleared.

Writ of
attach-
ment after
prior writ.

Breaking
open outer
doors to
execute
writ of
attach-
ment.

the officer charged with the execution of the writ may, if necessary for the purpose of executing it, break open the outer door of the house of the person to be arrested (*Brigg's Case*, 1 Roll. Rep. 336; *Burdett v. Abbot*, 14 East, 1, and 157-8). As to arrest on process of a punitive and disciplinary character, see *In re Freston* (11 Q. B. D. 545). The Sheriff may not break any man's house to take execution unless in the Queen's case or for contempt (*Semayne's Case*, Cro. Eliz. 909). It would seem, therefore, that the outer door can only be broken in cases of contempts criminal or wilful in their nature, and the punishment for which is disciplinary.

Delay in
issuing
attach-
ment after
order for
its issue.

There should not be unnecessary delay after obtaining the order for leave to issue it in issuing a writ of attachment. Where the order was more than a year old the issue of a writ of attachment thereunder was refused without an affidavit explaining the delay, and shewing that the applicant was not in fault (*Kemp v. Abraham*, 22nd June, 1888, Lave Reg. fo. 81).

Payment of
costs in
some cases
only pun-
ishment
inflicted.

In some cases of moving to commit, the payment of costs will be the only penalty imposed (as in *Littler v. Thomson*, 2 Beav. 129; and *Foster v. Newnes*, the "Times," 5th February, 1894, where an apology was made); but the Court discourages motions to commit where only costs are really sought (*Plating Company v. Farquharson*, 17 Ch. D. 49).

Impolitic
to resist
too strenu-
ously the
application
to commit
upon tech-
nical or
other
grounds
where
there has

The respondent to a motion to commit should be careful not to aggravate his offence by unduly resisting the application made against him. Thus in *Felkin v. Lord Herbert* (12 W. R. 241), pending proceedings in the suit relating to an open ditch at Sheerness (which in consequence of the litigation was known as "The Chancery Ditch"), an article appeared in a public paper holding

up to ignominy witnesses who had made affidavits, and reflecting on parties to the suit. On motion by the defendant to commit Mr. Rigg, the proprietor and publisher of the paper, Kindersley, V.C., held the publication was a contempt, and made an order for the committal of Mr. Rigg. This case is instructive as illustrating the circumstances under which the Court committed the offender instead of merely ordering him (as in *Little v. Thomson*, 2 Beav. 129) to pay the costs of the proceedings. His Honour's observations on this point are reported as follows (12 W. R. p. 243): "There
 "being no doubt about the contempt, how was it to be
 "visited? It was always a disagreeable office to have
 "to commit a party to prison; but the Court must not,
 "therefore, shrink from it, if justice required it, in order
 "to hold him up as a warning to others; and His Honour
 "had no alternative in this case but to commit him. His
 "Honour had the less hesitation in doing so from the
 "course he had pursued; he had either been unfortunately advised, or having received good advice had
 "not thought fit to follow it. Instead of doing what
 "any reasonable man would have done, and any legal
 "adviser would have counselled, making an affidavit
 "expressing regret and to propitiate the Court, he had
 "vindicated the truth of part of the statements, and
 "instructed counsel to argue that there was no contempt and he had a right to publish the article; and
 "if the Court thought there was a contempt, then he
 "would express his regret, which was, of course, no
 "expression of regret at all. He must be committed to
 "prison, where no doubt he would do that which would
 "enable the Court to discharge him at the earliest
 "possible moment, which His Honour need not say he

been an actual contempt.

Observations of Kindersley, V.C., as to this.

“should only be too happy to do, having no personal feeling on the subject.”

Good policy
to apologize.

It is to be observed also that in *Wellby v. Still* (66 L. T. 523) two persons who would not apologize for their alleged offence were ordered to be committed and to pay the costs; whereas for a somewhat similar and perhaps worse offence a contemnor who at once apologized was only fined £25 and ordered to pay the costs (*Reg. v. Barnardo*, the “*Times*,” 29th Nov., 1892). And in *Russell v. Russell* (11 Times L. R. 38) an editor who at once apologized for a contempt of a serious character was let off with a fine of £50 and costs in lieu of imprisonment.

Memorandum as to
the practice
by Mr.
Registrar
Lavie.

Upon the practice as to committal and attachment, the reader is referred to the valuable memorandum upon the subject prepared by G. Lavie, Esq., one of the Registrars of the Supreme Court, at the suggestion of one of the learned Judges of the High Court, and which, by the courtesy of Mr. Registrar Lavie, the author has been permitted to reproduce in Appendix A. This memorandum was cited to and accepted by the Court of Appeal as an authority on the practice (*In re Evans, Evans v. Noton* [1893], 1 Ch. at p. 259).

CHAPTER X.

THE WRIT OF NE EXEAT REGNO, AND ARREST OF DEFENDANTS UNDER SECT. 6 OF THE DEBTORS ACT, 1869, AND OF CONTRIBUTORIES UNDER SECT. 118 OF COMPANIES ACT, 1862, AND COMMITTAL FOR PERJURY.

IN addition to the cases in which the object of imprisonment is either to enforce obedience to the orders of the Court or to punish disobedience to, or contempt of the Court or its commands, the Judges of the High Court of Justice have power, under certain circumstances, to order the arrest and imprisonment of persons who have neither treated the Court with disrespect, nor disobeyed or threatened to disobey its orders.

It sometimes happens (*e.g.* where a plaintiff is unable to establish his case except upon the admissions of his adversary) that a defendant may by leaving the country, and so putting himself beyond the jurisdiction of the English Courts, seriously prejudice or perhaps altogether defeat a just claim.

To prevent such a miscarriage of justice, suitors in the High Court of Chancery could for many years before the coming into operation of the Judicature Act, 1873, apply for and in a proper case obtain a writ called a writ of *ne exeat regno*, addressed to the Sheriff of the county where the party named therein was supposed to be residing,

and commanding him to cause such party to come before him and give sufficient bail in the sum indorsed on the writ, that he would not go or attempt to go into parts beyond the seas without leave of the Court, and on his refusal or neglect to comply with this demand to commit him to prison.

Originally
a high pre-
rogative
writ.

This writ, which issued only out of the Court of Chancery or the Court of Exchequer on its equity side (so long as it had an equitable jurisdiction), was originally a high prerogative writ by which the Crown was enabled to prevent any of its subjects from leaving the country when their services were required in it. The writ was subsequently applied to cases between subjects, and the principles which guided the Court in directing or refusing its issue became by degrees clearly defined, so that Lord Eldon says in *Boehm v. Wood* (T. & R., at p. 349): "This Court, if not bound *ex debito justitiæ*, is bound in the exercise of a sound discretion to grant the writ if the case be a case in which the writ ought to be granted."

Present
practice.

Under the present practice the writ is issued out of the Chancery Division of the High Court of Justice, and in order to obtain it the applicant must shew (1) that the circumstances are such that the Court of Chancery would have granted the writ, and (2) that the case is one which falls within section 6 of the Debtors Act, 1869 (*per* the Court of Appeal in *Drover v. Beyer*, 13 Ch. D. 242). "Under the present practice the writ of *ne exeat regno* is not to be issued except in cases which come within the provisions of section 6 of the Debtors Act, 1869" (*per* Jessel, M.R., in the Court below in *Drover v. Beyer*, *ib.* at p. 243).

On what
conditions
granted.

In order to obtain the writ from the Court of Chancery the applicant was obliged to satisfy the Court:—

First, that an equitable debt was due to him from the party against whom the writ was applied for (*Boehm v. Wood*, T. & R., at p. 343). A legal debt was not sufficient (*Jackson v. Petrie*, 10 Ves. 164; *Gardner v. —*, 15 Ves. 444), though in cases where the Court of Chancery had co-ordinate jurisdiction with the Common Law Courts—particularly where an account or the specific performance of a contract to purchase real estate was sought by a vendor—the writ was issued (*Boehm v. Wood*, *supra*; *Jones v. Sampson*, 8 Ves. 598); but in the latter class of cases, only where the Court could see that specific performance of the contract must or in all probability would be decreed (*Morris v. McNeil*, 2 Russ. 604, and see *Raynes v. Wyse*, 2 Mer. 472). The equitable debt may be proved either by the evidence of the applicant or by the admissions of the party against whom the writ is asked (*Roddam v. Hetherington*, 5 Ves. 91).

Secondly, that the debt was payable *in præsentia*,^{Presently payable.} and not on a future day (*Whitehouse v. Partridge*, 3 Swan. at p. 377, and *per Fry*, L.J., in *Colverson v. Bloomfield*, 29 Ch. D., at p. 348). However, in *Whitehouse v. Partridge*, Lord Eldon says (p. 375): “If the Court having granted time for payment of money is satisfied before the time arrives that the party is going abroad to prevent payment of the money, it will undoubtedly interpose.” In *Sobey v. Sobey* (L. R. 15 Eq. 200), a defendant, having by his answer admitted a sum of £600 to be due from him, was by the decree in the suit (which was made 4th December, 1872), ordered to pay that amount into the bank on or before the first day of Hilary Term, 1873. A writ of *ne exeat* was obtained against the defendant on 14th December, 1872, and he having been arrested thereunder, moved

that the writ might be discharged on the ground (*inter alia*) that until the day for payment fixed by the decree had arrived, the money was not due and payable, and therefore that the issue of the writ was irregular. But Bacon, V.C., held that as the defendant had by his answer admitted that the money was due from him, the fact that the Court had extended the time for payment could not alter his liability to pay, and refused the application. The Vice-Chancellor distinguished the case of an extension of time voluntarily granted by the creditor from the one before him; in the former case, as appears from Lord Eldon's observations in *Whitehouse v. Partridge* (*supra*), the writ could not be issued until the extended time had expired.

Of ascer-
tained
amount.

Thirdly, "There must be a debt in respect of which the Court can see its way to direct what sum shall be marked upon the writ" (*Boehm v. Wood*, T. & R., at p. 344), or, in other words, the applicant, or some person on his behalf, must be able to swear positively to the amount of the debt; there being an exception to this rule where an account was sought, as it was in such cases considered sufficient for the applicant to swear to his belief as to the balance due to him (*Rico v. Gualtier*, 3 Atk. 501; *Flack v. Holm*, 1 J. & W. 405; *Boehm v. Wood*, T. & R., at p. 344).

Except in
cases of
account.

Limited to
pecuniary
demands.

Fourthly, the applicant's claim must have been pecuniary; an application for the writ, in order to enforce an agreement to give a bill of exchange to secure the debt of a third person, was refused (*Blaydes v. Calvert*, 2 J. & W. 211). Whether the writ would be issued simply to enforce the payment of costs seems doubtful (*Goodman v. Sayers*, 5 Mad. 471; *Stewart v. Stewart*, 1 Ball & Beattie, 73).

The writ may be granted in a proper case at the instance of one defendant against a co-defendant (*Sobey v. Sobey*, L. R. 15 Eq. 200, and *Lees v. Patterson*, 7 Ch. D. 866), and against a person who is going abroad in the course of his ordinary business (*Stewart v. Graham*, 19 Ves. 313); nor is the fact that the person, against whom the writ is asked, has property other than that which is the subject-matter of the suit, any ground for refusing the writ, for *non constat*, that he will have that or indeed any property when the suit is tried (*Boehm v. Wood*, T. & R., at p. 388). Where the applicant was himself resident abroad the Court refused to issue the writ (*Hyde v. Whitfield*, 19 Ves. 342); and a temporary residence in this country will not put the applicant in any better position (*Smith v. Nethersole*, 2 R. & M. 450), if it be colourable only and for the purpose of obtaining the writ: *secus*, where it is *bonâ fide* (*per Fry, J.*, in *Lees v. Patterson*, 7 Ch. D., at p. 869).

The writ, under the present practice, is applied for on motion *ex parte*, either before or after service of the writ of summons (Dan. Ch. Pr. 6th ed. 1653), and the application must be supported by an affidavit shewing that the case falls within the rules above laid down. The applicant must also satisfy the Court that the party against whom the application is made intends to go abroad, and this must be shewn either by deposing to facts, which are evidence of an intention to do so, as in *Sobey v. Sobey* (L. R. 15 Eq. 200), or by setting out in the affidavit declarations of intention, such as threats or statements of such intention (*Knight v. Watts*, 2 Coop., temp. Cottenham, 257). A statement of belief that a party intends to go abroad without setting out the

In what
cases writ
issues.

Present
practice.

circumstances upon which such belief is founded, is not sufficient, *Perry v. Dorset* (19 W. R. 1048), where Romilly, M.R., dissented from *Russell v. Ashby* (5 Ves. 96), in which case Lord Loughborough took the opposite view. And see *Darley v. Nicholson* (1 Dr. & War. 66). In addition to this, it must, since the Judicature Act, 1873, came into operation, be shewn (unless the action is for a penalty, or a sum in the nature of a penalty, other than a penalty in respect of any contract) that the applicant will be materially prejudiced in the prosecution of his claim by the absence from England of the person against whom he is seeking to issue the writ (*per* Jessel, M.R., in *Drover v. Beyer*, 13 Ch. D., at p. 243). The writ, when issued, is directed to the Sheriff of the county in which the person against whom it is issued is supposed to be, and the amount for which the party is to give security must be written *in words* on the back. A form of writ of *ne exeat regno* will be found in Appendix B.

Under-
taking in
damages.

When the writ is granted the party obtaining it is almost invariably required to give an undertaking in damages (1 Seton, 5th ed., 451), and where it is obtained at the instance of an infant or a lunatic, the undertaking must be given by the next friend or committee as the case may be.

Duties of
Sheriff.

The Sheriff, when the writ has been delivered to him, must forthwith arrest the party named therein, and keep him in custody until he has either executed a bond with two sureties, of whose sufficiency the Sheriff is satisfied, conditioned in double the sum marked on the writ that he "will not go, or attempt to go, into parts beyond the seas without leave" of the Court (see Dan. Ch. Prac., 6th ed., p. 1657). It appears from what

was done in *Boehm v. Wood*, that the Sheriff may, if he please, take a deposit of the sum endorsed on the writ instead of exacting security (T. & R., at p. 387). After he has executed the writ the Sheriff must (as directed by the writ itself) return it, together with a certificate of its execution, into the High Court of Justice.

The order directing the writ to issue may, like all other *ex parte* orders, be discharged by motion on notice given by the person affected thereby, if he can show that the writ was obtained by misrepresentation or suppression of material facts; or that the facts deposed to by or on behalf of the applicant (even if true) did not justify its issue, or by adducing evidence in contradiction of that upon which the order was made. The bare denial, by the party moving to discharge, of any intention to go abroad is not sufficient (*Amsinck v. Barklay*, 8 Ves., at p. 597; *Whitehouse v. Partridge*, 3 Swan., at pp. 374-5). He must adduce evidence in corroboration of such denial. The Court will then (if it be of opinion that the order cannot be supported) discharge it, with or without costs, and may, if it thinks fit (where an undertaking in damages has been given), order an enquiry as to the damage sustained by its issue: *General Insurance Company "Helvetia" v. Kühner* (W. N., 1875, p. 88), where this course was taken by Hall, V.C., who came to the conclusion that the evidence on which the order had been made was altogether untrustworthy. See also *Sichell v. Raphael* (4 L. T., N. S., 114).

Any application to discharge the order should be made promptly, and where a party who had been arrested on a writ of *ne exeat* made no complaint till

Discharge
of order
directing
writ to
issue.

Applica-
tion must
be made
promptly.

the trial of the action, that the writ had been irregularly issued, it was held by Fry, J., that the irregularity (if any) had been waived, and that the defendant could not recover damages for his arrest (*Lees v. Patterson*, 7 Ch. D. 866). See also on this point, *Jackson v. Petrie* (10 Ves., at p. 166).

Terms on
which
prisoner
discharged.

The party arrested will be discharged upon payment into Court of the amount marked on the writ (*Evans v. Evans*, 1 Ves. Jun. 96; *Dick v. Swinton*, 1 V. & B. 379), or upon his giving satisfactory security (*Sobey v. Sobey*, L. R. 15 Eq. 200), or, *semble*, on his becoming bankrupt (see *James v. North*, 5 Jur., N. S., 84, where the defendant had taken the benefit of the Insolvent Debtors Acts). Where a defendant had been discharged on the ground that the writ had been irregularly issued, he was restrained from bringing an action for false imprisonment against the party who had obtained the writ (*Darley v. Nicholson*, 2 Dr. & War. 86). It must, however, be remembered that so long as the order remains undischarged, it cannot be disregarded, and, therefore, if the party who has given security that he will not go abroad chooses to leave the country without the leave of the Court, for any purpose whatever, his sureties may be called upon to pay the sum named in their bond (*Utten v. Utten*, 1 Mer. 51). For form of notice of motion to discharge the order granting a writ of *ne exeat*, see Appendix B.

Power to
arrest
absconding
contribu-
tory under
the Com-
panies Act,
1862,
s. 118.

By section 118 of the Companies Act, 1862, "The Court may at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal

any of his goods or chattels for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested" and to be safely kept until such time as the Court may order. The procedure under this section is similar to that in the case of an application for an ordinary writ of *ne exeat regno*. In *In re Cotton Plantation Company of Natal* (W. N., 1868, p. 79), Romilly, M.R., is stated to have expressed an opinion that before an order can be made under this section, the liquidator must bring an action and recover judgment against the contributory; but a different view seems to have been taken in *In re Imperial Mercantile Credit Company* (L. R. 5 Eq. 264), and *In re Ulster Land Company* (17 L. R. (Ir.) 591). For form of order for arrest under the above section, see Appendix B.

The provisions of section 6 of the Debtors Act, 1869, ^{Debtors Act, 1869, s. 6.} and the procedure thereunder must now be considered. That section runs as follows: "After the commencement of this Act a person shall not be arrested on mesne process in any action. Where the plaintiff in any action in any of Her Majesty's Superior Courts of Law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a Judge of one of those Courts, that the plaintiff has good cause of action against the defendant to the amount of £50 or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in

the prosecution of his action, such Judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months unless and until he has sooner given the prescribed security not exceeding the amount claimed in the action that he will not go out of England without the leave of the Court.

“Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison.”

Law anterior to passing of this Act.

This section, it will be observed, speaks of actions in which, if brought before the commencement of the Act, “the defendant would have been liable to arrest.” In order, therefore, to understand the meaning and effect of the section, it is necessary to state shortly how the law stood before the passing of the Debtors Act, 1869.

Ancient procedure in Common Law actions.

When Sir W. Blackstone wrote his Commentaries, and for many years afterwards, all actions in the Courts of Common Law were commenced by a writ of *capias ad respondendum*, addressed to the Sheriff of the county in which the defendant was supposed to be living, commanding him to take and safely keep the defendant until he should have given bail, or made deposit according to law. If the action were for debt or in damages, where the damages were capable of being ascertained with

certainty by mere calculation, and the plaintiff made an affidavit that his cause of action amounted to £10 or upwards, the defendant was, as of course, arrested and obliged either to put in substantial sureties (called special bail) for his appearance, or to remain in custody. Where the action sounded in damages and the damages were uncertain, he was not arrested or compelled to give special bail unless so ordered by a Judge or by the Court. As a rule, such an order would not be made except under such special circumstances as made it necessary that the defendant should be kept within the reach of justice (see Black. Comm. Ed. 1768, vol. iii. 292).

It is obvious that so extensive a power of causing a defendant to be arrested was liable to great abuse, and it was therefore enacted by 1 & 2 Vict. c. 110, that arrest on mesne process (*i.e.* arrest before judgment) should be abolished in all Inferior Courts, and (except as hereinafter provided) in the Superior Courts also. By section 3 of the Act a procedure in some respects analogous to the Chancery writ of *ne exeat* was introduced into the Common Law Courts. It was thereby provided that where a Judge of the Superior Courts of Common Law was satisfied by affidavit that a plaintiff in any action in which the defendant was then liable to arrest had a cause of action against the defendant to the amount of £20 or upwards, or had sustained damage to that amount, and that there was probable cause that the defendant was about to quit England unless forthwith apprehended, he might by special order direct that the defendant should be held to bail for such amount as he should think fit, not exceeding the debt or damages, and thereupon the plaintiff might sue

Arbitrary
power to
arrest
liable to
abuse.

out a writ of *capias*, upon which the defendant was arrested and either imprisoned or held to bail. This enactment was superseded by sect. 6 of the Debtors Act, 1869, and repealed by an Act of the same session (82 & 83 Vict. c. 83).

Further
restriction
by Debtors
Act on
power to
arrest.

The Debtors Act, 1869, requires an applicant not only to satisfy the requirements of the former Act, but to shew that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action.

"Materially
prejudice the
plaintiff in
the prosecution
of his action."

It has been held that the words "prosecution of his action" apply to proceedings before and not after final judgment, and that where a defendant has, by his admissions, put the plaintiff in a position to sign judgment against him, he cannot be arrested under the section. It is stated in Day's Common Law Procedure Acts (4th ed., p. 407), to have been repeatedly held by Willes, J., at Chambers, that "the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action" only when the plaintiff requires the defendant's presence for the purpose of evidence, whether in the form of discovery or *viva voce* examination. It is also said (Day, *ib.*) that if the defendant will agree to admit at the trial the facts which the plaintiff in his affidavit alleges that he requires the defendant to prove, the order will not be made. This view seems to be supported by the observations of the judges in *Yorkshire Engine Company v. Wright* (21 W. R. 15).

Rules of
Court.

Rules for the purpose of regulating the course of procedure under sect. 6 of the Debtors Act were drawn up and promulgated by the Common Law Judges shortly after the passing of the Act (see L. R. 5 Q. B. 669);

but these rules were repealed by the R. S. C., 1883 (Preliminary Order and Appendix O.), and were, with only slight modifications, re-enacted by Order LXIX. of the same rules. Under the rules of this Order any application for an order under the section must be made to a Judge at Chambers (a Master has no jurisdiction, as the liberty of the subject is involved: see Order Lrv., rule 12a), on affidavit and *ex parte*. No summons is necessary, but the affidavit must clearly bring the case within the four corners of the section, and, in particular, state fully and clearly the facts which the plaintiff requires the defendant to prove. To say that he is a material witness is not enough. (*Per Lopes, J., in Comedy Opera Company v. Carte, W. N., 1879, p. 210.*)

Rules of
Supreme
Court,
Order
LXIX.

No writ for the defendant's apprehension is issued—the Judge's order being sufficient. For form of order, see Appendix B. Delay in making the application is ground for refusing the order: *Hasluck v. Lehman* (6 Times L. R. 495).

No writ
necessary—

If the defendant be arrested, he cannot be detained in prison under the section after final judgment has been signed in the action (*Yorkshire Engine Company v. Wright, 21 W. R. 15; Hume v. Druyff, L. R. 8 Ex. 214*), and may at any time after his arrest apply to the Court or a Judge to rescind or vary the order, or to discharge him from custody.

Limit of
period of
imprison-
ment.

The remarks already made as to the discharge of an order for a writ of *ne exeat* apply to the discharge of an order under section 6 of the Debtors Act, 1869, but in this, as in the case of all *ex parte* orders made at Chambers in the Queen's Bench Division, the party applying to discharge or vary should, in the first

Discharge
of order.

instance, apply by summons served on the other side, to the Judge who made the order, asking him to discharge or vary it, as the case may be.

Committal
and prose-
cution for
perjury.

By 14 & 15 Vict. c. 100, s. 19, the Judges or a Judge of the Superior Courts of Law and Equity, and other judicial persons, are empowered, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury, in any evidence given, or in any affidavit, deposition, or examination, answer, or other proceeding, made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution; and to commit such person so directed to be prosecuted until the next session of oyer and terminer, or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the Court without leave; and to require any person he or they may think fit to enter into a recognizance conditioned to prosecute and give evidence against such person so directed to be prosecuted, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and on production thereof the costs of the prosecution are to be allowed by the Court before whom the person is tried, unless that Court otherwise specially directs.

The provisions of this Act were put in force by Provisions
Bacon, V.C., in *S— v. W—*, 19th February, 1877 of Act put
(Seton, 5th ed., p. 411). in force.

For forms of orders, &c., under the Act, see Seton,
5th ed., pp. 409–10.

CHAPTER XI.

PRIVILEGE FROM ARREST UPON CIVIL PROCESS.

HAVING now endeavoured to enumerate all the instances in which, in the course of civil proceedings (other than in Bankruptcy), persons may be committed to prison for offences and otherwise, it becomes necessary to consider privilege from arrest upon civil process.

Origin of
the claims
of privilege.

The fact that in so large a number (perhaps a majority) of civil cases a defendant was, until comparatively recently, compelled either to find bail or go to prison, produced as an inevitable result a large number of claims of privilege from arrest. Many of these claims were allowed by the Courts, some because the Judges were not strong enough to resist them, others because public policy seemed to require that all persons should, under certain circumstances, have immunity from arrest in civil cases. In the old reports we frequently find the question of privilege discussed by the Judges, both with reference to the persons entitled thereto, the circumstances under which it arose, and the extent to which it should be allowed, but the comparatively recent legislation which abolished (with a few exceptions) arrest both on mesne and final process has rendered this question of privilege from arrest of much less importance. It is, perhaps, due to

this fact that the matter has not been dealt with by the Legislature, and that anomalous and sometimes invidious distinctions have not been swept away, or, at least, curtailed and clearly defined. As, however, questions of privilege still sometimes arise, it has been thought well to devote a chapter to the subject; stating in whose favour, and under what circumstances, the privilege exists, its extent, and the manner in which it must be claimed.

Privilege is said to be on the one hand permanent or absolute, or, on the other, temporary or accidental. In other words, while some persons are from their position or dignity privileged at all times from arrest, others are so privileged only under certain circumstances and at particular times.

With regard to those whose privilege from arrest is permanent or absolute—members of the Royal Family and peers of England, Great Britain, and the United Kingdom are at all times exempt from arrest in civil cases (*Earl of Shrewsbury's Case*, 9 Rep. 49A and 68A; *Foster v. Jackson*, Hob. 61; *Couch v. Lord Arundel*, 3 East, 127). Peeresses, whether such in their own right or by marriage, are equally privileged (*Countess of Rutland's Case*, 6 Rep. 52B; *Lady Huntingdon's Case*, 1 Vent. 298). If a peeress in her own right marries a commoner, she does not thereby lose her privilege, though it is otherwise in the case of a peeress by marriage (see *Countess of Rutland's Case*, *supra*, and Co. Litt. 16B); for, as by marriage she gained her rank, so by marriage she loses it: *eodem modo quo quid constituitur dissolvitur*. Bishops stand on the same footing as lords temporal (see Bacon's Abridg. tit. Privilege (c) 3; *Rex v. Bishop of St. Asaph*, 1 Wils. 332;

Privilege is either permanent or temporary.

Persons enjoying permanent privilege. Royal family. Peers.

Bishops.

The Seven Bishops' Case, 3 Mod. 215). In both of these cases it was assumed that there was no distinction between lords spiritual and lords temporal in this respect. It has been held that the effect of the 23rd Article of the Act of Union with Scotland (5 Anne, c. 8) is to protect all Scotch peers, whether representative peers or not, from arrest in civil cases (*Lord Mornington's* (or *Mordington*) *Case*, Fortescue, 165; and *Digby v. Earl of Stirling*, 1 Moore & Scott, 116). All Irish peers are also, it would seem, entitled under Article 4 of the Act of Union with Ireland (39 & 40 Geo. 3, c. 67), to every privilege of peerage except (in the case of non-representative peers) that of sitting and voting in the House of Lords, unless they choose to waive the privilege by becoming members of the House of Commons, for while they sit in the Lower House they cannot claim the privilege of peerage (*Coates v. Lord Hawarden*, 7 B. & C. 388; *Lord Rokeby's Case*, 8 Ves. 601).

No jurisdiction over a foreign sovereign. The Courts in this country have no jurisdiction over an independent foreign sovereign (*Mighell v. Sultan of Johore* [1894], 2 Q. B. 352).

Members of the House of Commons. Members of the House of Commons are, during the Session of Parliament, privileged to the same extent as peers, and the privilege extends over such a period before the meeting of Parliament and after its prorogation as may enable members conveniently to come from or go to any part of the United Kingdom (*Cassidy v. Stewart*, 2 Man. & Gr. 487). This period was at first of uncertain duration, but it was decided in *Goudy v. Duncombe* (1 Ex. 430) that it existed for forty days before and after the session. A dissolution is for this purpose equivalent to a prorogation, and a member of the old Parliament is protected for forty days after a

dissolution, even though he be not re-elected (*In re Anglo-French Co-operative Society*, 14 Ch. D. 533).

Members of Convocation are by the Act 8 Hen. 6, c. 1, Members of Convocation.
 “to fully use and enjoy such liberty or defence in coming, tarrying, and returning [to or from Convocation] as the great men and commonalty of the realm of England called or to be called to the King’s Parliament do enjoy, and were wont to enjoy, or in time to come ought to enjoy.”

It is said that Judges of the Supreme Court of Judges of the Supreme Court. Judicature are also absolutely privileged from arrest both on mesne and final process: Chitty’s Archbold (14th ed., 1458). There does not seem to be any direct authority upon the subject; the question being one which in practice is not likely to arise.

By 7 Anne, c. 12, it is enacted, “That all writs and Ambassadors and their servants. processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other public minister of any foreign Prince or State authorized and received as such by Her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister may be arrested and imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed to be utterly null and void to all intents, constructions, and purposes whatsoever.” The Act, after prescribing the method of proceeding against, and punishment of, plaintiffs, solicitors, and others, who sue out and execute process against the persons protected by the statute, provides (section 5), that “No merchant or other trader whatsoever within the description of the statutes against bankrupts who hath or shall put himself into the service of such ambassador

or other public minister shall have or take any manner of benefit by this Act, and that no person shall be proceeded against as having arrested the servant of an ambassador or public minister by virtue of this Act unless the name of such servant be first registered in the office of one of the principal Secretaries of State, and by such Secretary transmitted to the Sheriffs of London and Middlesex for the time being, or their Under-sheriffs or deputies, who shall upon the receipt thereof hang up the same in some place in their offices whereto all persons may resort and take copies thereof without fee or reward." This statute, which was passed (as stated in the preamble) in consequence of the arrest of the ambassador extraordinary of "his Czarish Majesty Emperor of Great Russia, Her Majesty's good friend and ally," was only declaratory of the Common Law: *Viveash v. Becker* (9 Maule & S. 284).

7 Anne,
c. 12, de-
claratory
of the
Common
Law.

Who are
servants
within the
Act.

The Act does not extend to such of the domestic servants of an ambassador as are subject to the bankrupt laws (section 5 of the Act (*supra*), and see *Triquet v. Bath* (3 Burr. 1478)); nor, generally speaking, to consuls or their servants (*Viveash v. Becker* (*supra*), and see *Clarke v. Cretico* (1 Taunt. 106)); nor to persons holding situations inconsistent with the office of a domestic: *Masters v. Manby* (1 Burr. 401), where the defendant was employed in the Custom House at London; nor to any person not *bonâ fide* in the service of an ambassador: *Carolino's Case* (1 Wils. 78); *Lockwood v. Coysgarne* (3 Burr. 1676); nor, *semble*, to a courier paid for each journey, and not by fixed wages: *Deserisay v. O'Brien* (Barnes, 375). But it is not necessary that the servant should reside in the ambassador's house (*Evans v. Higgs*, 2 Str. 797), though he

must do some service there (*Widmore v. Alvaraz*, 2 Str. 797); and a chorister *bonâ fide* employed by an ambassador is within the privilege, see the *dicta* in *Fisher v. Begrez* (1 Crompt. & M. 117). It is not material whether the servant be a foreigner or a native of this country: *Lockwood v. Coysgarne* (*supra*). A *Chargé d'affaires* secretary and councillor of legation of a foreign Sovereign has all the privileges of an ambassador appointed by him and acting in the absence of the ambassador as *chargé d'affaires* is entitled to all the privileges of an ambassador, and therefore does not forfeit such privileges by trading here, as he is not within the 5th section of 7 Anne, c. 12: *Taylor v. Best* (14 C. B. 487), and see *Parkinson v. Potter* (16 Q. B. D. 152); but in *Taylor v. Best* (*supra*), as the defendant had appeared, pleaded and obtained a rule for a special jury, it was held that he was too late in making an application for a stay of proceedings on the ground of privilege, Privilege waived by appearing and pleading, and not taking objection.

The privilege of an ambassador continues until after the presentation of his letter of recall to the Queen, and the expiration of a reasonable time for his leaving this country, and he can only be sued here in respect of what he may afterwards do or cause to be done in this country (*Musurus Bey v. Gadban* [1894], 2 Q. B. 352). His privilege from arrest has the like extent. Duration of privilege after recall.

If any ambassador, minister, or other person protected by the Act be arrested, he will on application (by motion or summons) to the Court out of which the process issued, or a Judge thereof, supported by evidence shewing that he is within the Act, be discharged from custody. Discharge of person arrested in violation of Statute.

Privilege from arrest in civil cases is also enjoyed by the domestic servants of the King or Queen regnant, Servants, &c., of the King or

Queen have
privilege
from
arrest.

unless notice be first given to the "Lord Chamberlain," who must in convenient time either remove them or make them pay their debts, the privilege being the King's, not the party's, *Rex v. Moulton* (2 Keb. 3); and see *Bartlett v. Hebbes* (5 T. R. 686); and by all other persons whose attendance upon the King or Queen is deemed to be necessary, *e.g.* lords of the bedchamber: *Aldridge v. Barry* (8 Dowl. 450); the King's chaplains: *Pain v. Dibdin* (1 Gale, 58); and sub-nom. *Byrn v. Dibdin* (3 Dowl. 448); *Winter v. Dibdin* (13 M. & W. 25); and the pages of the presence in ordinary: *Reynolds v. Pocock* (4 M. & W. 371). In the case of a gentleman of the King's privy chamber, who having been taken into custody, moved the Court for his discharge, as it appeared that gentlemen of the privy chamber had no salary or profit, and were never called upon to perform any services of a domestic nature in the royal household, the Court, without deciding whether the prisoner was privileged, refused to order his discharge on motion, but left him to sue out his writ of privilege: *Luntley v. Battine* (2 B. & Ald. 234). It has been held that the privilege does not extend to the servants of a Queen Consort or a Queen Dowager: *Starkie's Case* (1 Keb. 842), and *R. v. Baud & Segrave* (1 Keb. 877); nor, as it seems, does it include any person who though nominally in the service of the Crown is not liable to be summoned at any time to attend the Sovereign: *Luntley v. Battine* (*supra*). The privilege is not lost by engaging in trade: *King v. Foster* (2 Taunt. 167), though in that case it was argued that if the King's servants chose to trade they should be subject to the same liabilities as other traders.

Privilege
does not
extend to
a Queen
Consort's or
Dowager's
servants.

Persons

With regard to that species of privilege which is

temporary or accidental, it has been laid down as a general rule that the officers of the various Courts (Bacon, Abridg. tit. Priv. (B.) 2), and all persons who have relation to a suit which calls for their attendance on the Court, whether compelled to attend by process or not, are entitled to privilege from arrest both on mesne and final process, *cundo, morando, et redeundo*, provided they come *bonâ fide* (*Meekins v. Smith*, 1 H. Black. 636; *Arding v. Flower*, 8 T. R. 534; *Ex parte King*, 7 Ves. 312); and therefore parties to causes, including parties in criminal cases (*Gilpin v. Cohen*, L. R. 4 Ex. 131); witnesses (*Lawford v. Spicer*, 2 Jur. N. S. 564); creditors attending the Bankruptcy Court to oppose a debtor's discharge (*Willingham v. Matthews*, 6 Taunt. 356); jurors (*per Kelly*, C.B., in *Gilpin v. Cohen*, L. R. 4 Ex. at p. 134), and bail (*Rimmer v. Bail Green*, 1 M. & S. 638) are so privileged.

The privilege extends to persons attending Judges' Chambers (*In re Jewitt*, 33 Beav. 559); Inferior Courts, *e.g.* the County Court (*Clutterbuck v. Hulls*, 4 Dowl. & Lown. 80); an inquiry before the Sheriff under a writ issued for the purpose (*Walter v. Rees*, 4 Moore, 484); an arbitration under a reference directed by the Court (*Moore v. Booth*, 3 Ves. 350; *Spence v. Stewart*, 3 East, 89), and a Magistrates' Court (*Montague v. Harrison*, 27 L. J. C. P. 24).

Barristers and solicitors enjoy the same privilege, at any rate while going to and from the Superior Courts, or the offices thereof: *In re Hope* (9 Jur. 856); and *Attorney-General v. Skinners' Company* (1 C. P. Coop. 1), a case where a solicitor who had not renewed his certificate was acting as parliamentary agent. Barristers on circuit are free from arrest during the whole

enjoying
temporary
privilege.
Officers of
the Courts.

Parties to
a cause.

Witnesses.
Creditors
in bank-
ruptcy.

Extends to
Judges'
Chambers
and In-
ferior
Courts.

Barristers
and soli-
citors.

time the circuit lasts, and that, too, whether they have business or not (*Sheriff of Oxfordshire's Case*, 2 Car. & Kir. 200). Whether barristers and solicitors are privileged when attending Inferior Courts does not seem very clear. In *Newton v. Constable* (2 Q. B. 157), where a barrister was arrested on his way from Petty Sessions at which he had been engaged in defending a prisoner, his discharge was refused—but this decision seems to be at variance with *Luntly v. Nathaniel* (2 Dowl. 51), and also with the opinion expressed by the Court of Appeal in *In re Freston* (11 Q. B. D. at p. 551), that under such circumstances the privilege exists. The cases, however, may be distinguished on the ground that in the two latter there had, while in the former there had not, been a previous retainer. The privilege does not extend to solicitors' clerks (*Gardner v. Stroud*, Comber. 12; *Phillips v. Pound*, 7 Ex. 881).

Person
voluntarily
prosecu-
ting not
privileged.

Where a person voluntarily commences a prosecution he is not protected either when going for, or on his return after obtaining, a summons (*Ex parte Cobbett*, 7 Ell. & Bl. 955), in which case the Court held that the “*eundo, morando, et redeundo*” was indivisible, so that if a party were not privileged “*eundo*,” he would be in no better position “*redeundo*” (see, too, *Anon.* Salk. 544).

Privilege
of clergy-
man and
other
ministers
officiating.

By 24 & 25 Vict. c. 100, s. 86, it is (*inter alia*) enacted that whosoever shall upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender, shall be going to or returning from the celebration of divine service, or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or going to or

returning from the performance of his duty in the lawful burial of the dead in any churchyard or other burial-place, shall be guilty of a misdemeanour. By a former statute (9 Geo. 4, c. 31, s. 28) it had been made a misdemeanour to arrest any clergyman upon any civil process while performing divine service. The plaintiff, or his attorney, if they do not know of, or in any way authorize or instigate, such an arrest by the Sheriff's officer, are not responsible for it; *Goddard v. Harris* (5 Moore & Payne, 122), where the defendant, a clergyman, was unlawfully arrested under a *capias* by a Sheriff's officer while he was going to the communion-table to officiate on Christmas Day, 1830, in Baker Street Chapel.

Privilege from arrest also attaches to magistrates, ^{Magistrates and} clerks of the peace, or other officers when attending ^{others} Quarter or Petty Sessions in discharge of their duty ^{attending} (Com. Digest. tit. Priv. (A.) I.; *Clendinning v. Browne*, ^{Quarter} Sessions. 3 Ir. Com. Law Rep. 115); to coroners and deputy ^{Coroners.} coroners when engaged in their official capacities (*Callaghan v. Twiss*, 9 Ir. Law Rep. 422; *Ex parte Coroner for Middlesex*, 6 H. & N. 501; Jervis on Coroners, 4th ed., p. 72).

Soldiers and sailors in the Navy are by statute entitled ^{Soldiers of} to a partial exemption from arrest on civil process. By ^{regular} the Army Act, 1881 (s. 144), it is enacted that a soldier ^{forces.} of Her Majesty's regular forces shall not be liable to be taken out of Her Majesty's service by any process, execution, or order of any Court of law or otherwise, except (a.) on account of a charge of or conviction for crime, or (b.) on account of any debt, damages, or sum of money when the amount exceeds £30 over and above all costs of suit. The amount of the debt, damages, or

sum, is to be proved, before the Court has adjudicated on the case, by an affidavit of the person seeking to recover the same, or some one on his behalf, and such affidavit shall be sworn without payment of any fee, and a memorandum of such affidavit shall without fee be endorsed upon any process or order issued against the soldier. By section 190 (6) "soldier" is defined as including every person (other than an officer as defined by the Act) subject to military law, during the time that he is so subject.

Sailors in
the Navy.

By 29 & 30 Vict. c. 109, s. 97, it is made unlawful to arrest any petty officer or seaman, non-commissioned officer of Marines or marine belonging to any ship of Her Majesty by any warrant, process, or writ issued in any part of Her Majesty's dominions for any debt unless the debt was contracted at a time when the debtor did not belong to Her Majesty's service. An affidavit must be made by the plaintiff or some person on his behalf in the Court out of which such process issues, and before it issues, that the debt was contracted when the debtor did not belong to Her Majesty's service, and a memorandum of such warrant, process, or writ, must be marked on the back of the affidavit.

Eundo,
morando, et
redeundo.

The Courts have always put a liberal construction upon the words "*eundo, morando, et redeundo*," and allow some latitude to the person claiming the privilege. For example, a plaintiff who was waiting outside the Court and whose case was in the sittings list, although it had been arranged that it should not be taken on the day on which he was arrested, was held entitled to his discharge (*Childerston v. Barrett*, 11 East, 499). So, too, a defendant at the Winchester Assizes whose case was finished at 4 o'clock on the Friday afternoon, having stayed at

Winchester until after dinner on Saturday, being arrested at 7 o'clock on Saturday evening while on her way home, was discharged on the ground that the time during which she was protected had not expired (*Hatch v. Blisset*, Gilbert, 308). It is of course impossible to lay down any general rule as to the limits of the privilege; each case must be decided on its own facts (*Ex parte Temple*, 2 V. & B. 391; *Gibbs v. Phillipson*, 1 Russ. & My. 19; *Spencer v. Newton*, 6 A. & E. 623; *Attorney-General v. Leathersellers' Company*, 7 Beav. 157; *Strong v. Dickenson*, 1 M. & W. 488). A party or witness who is, at the close of the trial in which he is engaged, sent to prison for a contempt of Court does not forfeit his privilege by his involuntary detention (*Rex v. Wigley*, 7 Car. & P. 4).

By Order XLII., rule 1, of the Consolidated Orders of the Court of Chancery, "Officers and attendants upon the Court, suitors, and witnesses are to have privilege *eundo, morando, et redeundo*, for their necessary attendance but not otherwise, and where any of them are arrested at such times of necessary attendance it is a contempt of Court." These Orders were annulled by the Rules of the Supreme Court, 1883, but the effect of Order LXXII., rule 2, is, in all cases where no other provision is made by the Judicature Acts or Rules, to preserve the general jurisdiction and practice of the Court (*per Kay, J.*, in *Magnus v. National Bank of Scotland*, 36 W. R., at p. 603), and it may therefore be assumed that the Court has still power to protect any person privileged under Consolidated Order XLII., in the same way as though that Order were unrepealed.

The extent of the privilege has now to be considered; that is to say, how far persons entitled to privilege are

Officers of
the Court,
&c.

Contempt
to arrest
them.

Extent of
the privi-
lege.

thereby protected from arrest. With the exception of Ambassadors and others, for whom special statutory provision has been made (and whose rights are therefore defined by the statute relating to their particular cases), the limits of the privilege, whether it be permanent or temporary, appear to be the same for all persons entitled thereto (see the remarks of the Judges in *In re Freston*, 11 Q. B. D. 545), and therefore decisions which have been given with reference to one class of privileged persons are equally applicable to the others. It is said by Lord Coke (4 Inst. 24, 25) that, generally, privilege of Parliament protects a member from arrest and imprisonment, except in the three cases of treason, felony, and breach of the peace. Serjeant Hawkins, however, lays it down (2 P. C. c. 22, s. 33) that peers, whether spiritual or temporal, are liable to attachment for some contempts, and he gives as instances—rescuing a person arrested in due course of law, proceeding in a cause against the King's writ of prohibition, or for disobeying other writs wherein the King's prerogative, or the liberty of the subject, are nearly concerned.

Peers
liable to
attach-
ment for
some con-
tempts.

Lord
Broug-
ham's
summary
of the law
in *Long
Wellesley's
Case*.

The whole question of the extent of the privilege was most elaborately discussed by Lord Brougham in *Long Wellesley's Case* (2 R. & M. 689), where, after going through the prior decisions and authorities, he (at p. 665) thus states the conclusion at which he arrived: "Against all civil process privilege protects, but against contempt for not obeying process, if that contempt is in its nature or by its incidents criminal, privilege protects not." Ever since this case was decided it has been settled that where there has been a contempt of Court which, to use an expression of Lord Brougham, "*savours of criminality*" (2 R. & M. at p. 667), privilege is no protec-

tion from arrest; the rule above stated was recognised and adopted in *Lechmere Charlton's Case* (2 M. & C. 316) and other cases. The whole question was discussed and considered by the Court of Appeal in *In re Freston*, 11 Q. B. D. 545, and the Court in that case approved of and followed the decision in *Lechmere Charlton's Case*.

See also *Earl of Aylesford v. Earl Poulett* [1892], 2 Ch. 60, where North, J., declined to determine (saying that the point was a nice one and not easy) whether an innocent trustee (who was a peer) was entitled to privilege from arrest for not complying with an order to make good a misapplied trust fund from which he had received no personal benefit, although in the exercise of his discretion the Judge refused an attachment. It is submitted upon the authorities that such a trustee having been guilty of no offence—save that of being unable to pay money he never received—has done nothing which “savours of criminality,” or merits punishment, and is therefore entitled to his privilege of peerage, or other privilege from arrest.

An innocent trustee not personally guilty of making away with the trust fund is, it is submitted, entitled to claim any privilege from arrest.

The result of the authorities appears to be that where the attachment is mere process for enforcing obedience to the order of the Court, privilege protects; but that privilege is no protection where the attachment is ordered wholly or partially by way of punishment. One test by which it may be seen under which head a particular case falls is suggested by Fry, L.J., in *In re Freston* (11 Q. B. D. at p. 557); if the attachment be mere process, the party can obtain his discharge *ex debito justitiæ* by shewing that he has complied with the order, *secus*, where it is inflicted as a punishment.

Result of the authorities as to privilege.

On the principles above mentioned, it has been held that privilege is no protection in the following cases:

Instances in which privilege is

not a protection.

clandestinely removing a ward of Court from the custody of the person with whom the Court has placed her (*Long Wellesley's Case, supra*), writing a threatening letter to a Master of the Court of Chancery (*Lechmere Charlton's Case, supra*), addressing public meetings with a view to influence the result of a pending trial (*Onslow and Whalley's Case, L. R. 9 Q. B. 219*), default by a solicitor in payment of costs when ordered to pay costs for professional misconduct (*In re Freston, supra*), default by a solicitor in payment of a sum of money when ordered to pay the same in his character of an officer of the Court (*In re Dudley, 12 Q. B. D. 44*), default by a person acting in a fiduciary capacity and ordered by the High Court to pay money in his possession or under his control (*In re Gent, 40 Ch. D. 190*). The privilege has recently been held to extend to a person arrested on leaving the Court for non-payment of poor rates (*Hobern v. Fowler, 9 Times L. R. 6*).

But held to apply to a case of not paying rates.

Instances in which the claim of privilege has been allowed.

The claim of privilege has been allowed where an order on a Member of Parliament to pay money and deliver documents to the liquidator of a company had not been complied with (*In re Anglo-French Co-operative Society, 28 W. R. 580*), and where a Member of Parliament having refused to be examined as a witness, pursuant to an order of the High Court of Justice in Bankruptcy, the trustee of the bankrupt moved to commit him to prison for his contempt in disobeying the order (*In re Armstrong, Ex parte Lindsay [1892], 1 Q. B. 327*). In *Sir Robert Peel's Case (L. R. 3 Ch. 543)*, a motion having been made by the Charity Commissioners to commit to prison a Member of the House of Commons for contempt of Court in refusing to render accounts which they were authorized by

the Charitable Trusts Act, 1853, to require of him, Malins, V.C., held that the respondent's privilege as a Member of Parliament protected him against any order for committal, but on appeal the Lords Justices abstained from expressing any opinion on this point.

It may be mentioned, that by the Act 29 Car. 2, c. 7, Lord's Day Act. s. 6, it is enacted that every writ, process, warrant, order, judgment or decree served or executed on Sunday (except in case of treason, felony, or breach of the peace), shall be void. It has been held that the service being made by the statute absolutely void cannot be made good by any subsequent waiver: *Taylor v. Phillips* (3 East, 155). But it is said that a person may be arrested on Sunday on the Lord Chancellor's warrant, or on an order for commitment for contempt, for he is considered as in custody from the time of making the order (Dan. Ch. Prac., 6th ed. 886).

It was held in *Serjeant Scroggs's Case* (26 Car. 2, Mich. Term), that not only serjeants-at-law but all other Places in which persons are privileged from arrest. persons whatsoever, are freed from arrest so long as they are in view of any of the Courts at Westminster, or if near the Courts, though out of view, lest any disturbance may be occasioned to the Courts (Bac. Ab. tit. Priv. (B). 2). A person cannot be arrested in the Queen's presence, nor in the Queen's Courts of Justice while the Justices are there sitting, Chitty's Archbold (14 ed. 570), nor within the verge of a royal palace (3 Inst. 140), and see *Rex v. Stobbs* (3 T. R. 735), unless by the leave of the Board of Green Cloth; nor in the Tower, except, perhaps, by leave of the Governor: Chitty's Archbold (*supra*).

Formerly, when a privileged person was arrested, his Discharge

of privi-
leged
person un-
lawfully
arrested.

discharge, if the claim of privilege were clearly valid, was ordered on motion ; but if the case were doubtful he was left to sue out his writ of privilege or to plead in abatement. The writ has become obsolete, and pleas in abatement have been abolished (R. S. C., 1888, Ord. xxi., r. 20). The party must now apply for his discharge to the Court which ordered his arrest, in the same way as in any other case where a person desires an order for his release from prison.

CHAPTER XII.

PURGING CONTEMPT, AND DISCHARGE FROM CUSTODY.

It is necessary for a person adjudged to be in contempt, ^{Purging contempt.} to clear and purge his contempt. "Purgation is the "purging or clearing a man's self of a crime" (4 Bl. Com. 342). "An ordinary contempt in process, as it "is a matter merely between the parties, may be "cleared by the Contemnor doing the act, by the non-"performance of which the contempt was incurred, and "paying to the other party the costs occasioned by his "contumacy": Daniell's Chan. Prac. (6th ed., p. 900).

Where the contempt has arisen from doing an act ^{How con-} contrary to an injunction not to do it, the contempt ^{tempt is} is cleared by an apology to the Court, and making re- ^{cleared.} paration for the act improperly done, and paying the costs, which may be ordered to be paid as between solicitor and client. Where the contempt is one of the Court itself, it is cleared by submission and apology to the Court and payment of the costs. All contempts are also cleared after an order of the Court discharging the offender from punishment; *e.g.* if upon the application of the offender for release from custody that release is ordered, he cannot be again punished for the same contempt; but of course terms for his release from custody may be imposed which he must observe prior to obtaining such release.

No order for discharge necessary when duration of imprisonment specified.

When the duration of the imprisonment for contempt has been fixed by the law (*i.e.* the Act of Parliament giving the authority to imprison), or by the order for the imprisonment, the person imprisoned is entitled to his discharge from custody by the gaoler, without any order for the purpose immediately upon the expiration of the time limited for the imprisonment and endorsed on the writ of attachment or mentioned in the order to commit. It is conceived that any gaoler longer detaining the prisoner may render himself liable to an action for false imprisonment: *Greaves v. Keene* (4 Ex. D. 78), distinguishing *Moone v. Rose* (L. R. 4 Q. B. 486), and see also *Henderson v. Preston* (21 Q. B. D. 362). In other cases the party must apply to the Court to discharge the order for irregularity, or to the Court, or the Home Secretary, for an order for discharge from custody.

In other cases an order must be obtained for the discharge.

Application should not as a rule be *ex parte*.

The application for the discharge should not as a rule be made *ex parte* (although the contemnor has done the act for not doing which he was committed), but only upon notice, on the ground that the party who got the order is entitled to be present so as to ensure that all costs to which he is entitled are included in the order of discharge (*per* Kekewich, J., in *In re Evans*. *Evans v. Noton*, 68 L. T. 324, W. N., 1893, p. 32).

In general only *ex parte* orders discharged for irregularity.

An order will, in general, only be discharged for irregularity when it has been obtained *ex parte*, unless indeed the irregularity was not apparent and could not have been discovered, when the application for the committal was originally made in the presence of all parties.

Doubtful whether Judge can

Where the sentence has been for a fixed term for a criminal contempt, it is said that the Judge cannot

order the discharge of the culprit before the term expires, and that in such a case the Home Secretary (as representing the Sovereign) can alone decide whether the prisoner shall be discharged before the sentence expires (*In re The Dowager Duchess of Sutherland*, the "Times," 6th May, 1898). It is doubtful whether a Judge has power to reverse or modify a sentence of imprisonment for a fixed term (*per* Sir F. Jeune, P. *In re The Dowager Duchess of Sutherland*, *supra*).

The general rule is that parties must clear their contempt before they can be heard (*Vowles v. Young*, 9 Ves. 188). A party in contempt cannot, as a general rule, until he clears his contempt, be heard in any application he may be desirous of making to the Court: Daniell's Chan. Prac. (6th ed., p. 904); but the rule is confined to cases where he comes forward voluntarily, and a plaintiff in contempt is therefore entitled to make use of the process of the Court necessary to prosecute his cause, and a defendant in contempt is entitled to take any measures necessary for his defence, and to move for leave to defend *in formâ pauperis*; and the rule applies only to proceedings in the same cause, and does not prevent an application to discharge the contempt order for irregularity: Daniell's Chan. Prac. (6th ed., pp. 904-5), or to an application for discharge from custody; but the Court will, upon any application for discharge from custody, take into consideration the question whether the applicant has or has not done all in his power to purge his contempt. In the case of a writ of attachment ordered to issue no contempt is incurred until the writ is sealed: Daniell's Chan. Prac. (6th ed., p. 906).

Though generally a party cannot be heard until he But this

objection
may be
waived.

has cleared his contempt, a step taken by the other party waives the contempt for all purposes except the right to costs. Acceptance of an answer from the defendant was therefore a waiver of his contempt (*Anon.* 15 Ves. 174). Filing a cross-bill against a party in contempt in the original suit was also held to be a waiver of contempt on the part of the party who filed it (*Best v. Gompertz*, 2 Y. & C. Ex. 582).

Disability
of persons
in con-
tempt.

While in contempt persons cannot contradict statements in pleadings or allege any new facts in their defence; but they are entitled to be heard in Court to shew that the plaintiff has not made a sufficient case upon his own evidence (— *v. Gort*, 1 Hog. 77). A

They can
move to dis-
charge pro-
ceedings as
irregular.

party against whom an attachment has issued for disobedience to an order can move to discharge the order (*Odell v. Hart*, 1 Mod. 492; *Brown v. Newall*, 2 My. & Cr. 558). And he is entitled to be heard in Court to shew that the proceedings against him subsequent to the order placing him in contempt have been irregular (*King v. Bryant*, 3 My. & Cr. 191). A plaintiff in contempt can compel the production of deeds and documents relating to the matters in issue in the hands of the defendant (*Plumbe v. Plumbe*, 3 Y. & C. Ex. 622).

And can
compel
discovery.

Ex parte
application
for release.

It seems that where the act required to be done is certified by some officer of the Court to have been done, as in the case of an order to make and file an affidavit, the application for discharge from custody is *ex parte* and must be supported by the officer's certificate of the performance of the act: Chitty's Archbold (14th ed., p. 954). And where the act required to be done is the payment of money, or any other act the performance of which can be easily proved, the application may perhaps be made *ex parte*. But see *In re Evans*,

Evans v. Noton, 68 L. T. 324, W. N., 1893, p. 32, where it was held by Kekewich, J., that applications for release from custody should not in general be made *ex parte*. A defendant in contempt for not answering was always discharged *ex parte* upon certificate of answer filed and tender of costs (*Gray v. Campbell*, 1 R. & M. 323; *Ball v. Etches*, 1 R. & M. 324; *Edmonson v. Heyton*, 2 Y. & C. Ex. 3).

In other cases, the application for discharge from custody should be made to the Court or a Judge, after notice. Any application to discharge an order of committal or for an attachment for irregularity, or for an order for discharge from custody, is made by summons or upon notice of motion to the Court or Judge making the order. The summons or notice of motion must be duly served upon the party by whom the order for imprisonment has been obtained. Forms of notices of motion for discharge from custody will be found in the Appendix B.

Applica-
tion for
release on
notice.

Forms of
applica-
tions for
discharge.

In applying to discharge the order for imprisonment upon the ground of irregularity in obtaining it, the question whether or not the irregularity has been waived must be considered. But it must be borne in mind that where the proceedings, or the order founded thereon, are altogether void no question of waiver arises, as no waiver will render valid void proceedings or a void order; but there should be no more than necessary loss of time in applying to set aside the void proceedings or discharge the void order. Where a person is in custody under an attachment there can, it would seem, be no waiver of an irregularity in the attachment, and acts which would amount to a waiver under other circumstances are no answer to an application for

Discharge
on ground
of irregu-
larity.

Waiver.

discharge ; but where the person is not in custody, and he applies merely with the object of discharging the proceedings founded on the attachment, acts amounting to a waiver of the irregularity are available in answer to it (Daniell's Chan. Prac. 6th ed., p. 908).

Distinction
between
irregular
and erro-
neous
orders.

The principle of waiver applies only to an *irregular* and not to an *erroneous* order, and therefore where an order had been made that service upon the attorney should be good service, and service was accordingly effected upon the attorney, who thereupon entered an appearance, but it was found afterwards that the affidavit upon which the order for substituted service had been made was insufficient, the order and all subsequent proceedings were, on the motion of the defendant, ordered to be set aside, on the ground that the original order was erroneous and not irregular ; and that, *being erroneous, the defect was not cured by the subsequent appearance of the party* (Daniell's Chan. Prac. 6th ed., p. 908 ; and see *Levi v. Ward*, 1 S. & S. 334).

How irre-
gularity
may be
waived.

Any irregularity in applying for committal or attachment is waived by appearing upon the application, and not taking the objection (*Ex parte Alcock*, 1 C. P. D. 68 ; *Treherne v. Dale*, 27 Ch. D. 66) ; but not by appearing and at once taking the objection (*Ellerton v. Thirsk*, 1 J. & W. 376 ; *Hampden v. Wallis*, 26 Ch. D. 746 ; *Nelson v. Worssam*, W. N., 1890, p. 216 ; *Mander v. Falcke* [1891], 3 Ch. 488).

What does
not amount
to waiver.

A person is entitled to take advantage of objections on the ground of irregularities in the practice, notwithstanding that the person objecting has answered the affidavits to support an application for leave to issue a writ of attachment against such person, and has appeared upon the application (*per Kekewich, J.*, in

Taylor v. Roe, 68 L. T. 213 ; but see *Rendell v. Grundy* [1895], 1 Q. B. 16). There can be no waiver or acquiescence where there is want of jurisdiction in an inferior Court making an order appearing upon the face of the proceedings (*Farquharson v. Morgan* [1894], 1 Q. B. 552). By rule 239 of the Crown Office rules, a writ of *habeas corpus* must be served personally—the want of such service was held a fatal objection to a writ of attachment being issued for disobedience, and it was also held that an application for further time to make the return to the writ did not waive the objection to the service of the writ (*Reg. v. Rowe*, 11 Times L. R. 29).

Upon the question of what is a waiver, the following cases may be useful. A party whose solicitor was served with a copy of an order for discovery of documents not bearing the indorsement required by R. S. C., Order xli., rule 5, took out a summons for further time to file his affidavit of documents ; the application being refused, it was held by the Court of Appeal (*dissentiente*, Lindley, L.J.) that he did not thereby waive the irregularity of the service so as to prevent his taking the objection upon a motion for an attachment for not complying with the order (*Hampden v. Wallis*, 26 Ch. D. 746). An order on a solicitor to deliver his bill of costs was served by leaving the copy order with his clerk ; a correspondence thereupon ensued with reference to the order, and in the course of it the solicitor wrote : " You shall have the bill of costs in a week." North, J., upon a motion to commit the solicitor for a breach of the order, held that personal service of the order was absolutely necessary to found the proceedings, and that there had been no waiver of the right to take

Illustrations as to waiver, and cases thereon.
No waiver.

Waivers.

objection on the motion to the regularity of the service of the order (*In re Cunningham*, 55 L. T. 766). An agreement was entered into for the compromise of an action, and the plaintiff took out a summons in the action to set the compromise aside. The objection was taken in Chambers that the compromise could not be set aside on a summons. After this the plaintiff filed his affidavits, and the defendant then filed his affidavits and cross-examined the plaintiff's witnesses. North, J., held that the defendant had not by his conduct waived the objection (*Emeris v. Woodward*, 43 Ch. D. 185). And where affidavits were not served under Ord. LII., r. 4, with a notice of motion for attachment and the respondent answered them, it was held that this did not amount to a waiver, *Taylor v. Roe*, 68 L. T. 213. But where what is equivalent to service of them is subsequently accepted, the irregularity is waived, *Rendell v. Grundy* [1895], 1 Q. B. 16. And where the plaintiffs had commenced an action without leave in a County Court within the district of which the defendant had carried on business within six months before the commencement of the action, but did not dwell or carry on business at the time of action, and the defendant appeared, and the case was then heard and partly determined, and adjourned to a future day, and at the second hearing the defendant for the first time objected to the jurisdiction of the Court, the Judge held that the defendant, by previously appearing and contesting the action, had waived this objection; the defendant applied for a prohibition, and the Divisional Court held (following *In re Jones v. James*, 19 L. J. Q. B. 257) that the objection to the jurisdiction was one which could be waived, and that the defendant had under the circumstances waived it, and was not

entitled to a prohibition (*Moore v. Gamgee*, 25 Q. B. D. 244).

It is open to a person in custody to move to set aside the proceedings, and for his discharge from custody upon the ground of any irregularity in the proceedings upon which the order for his committal or attachment was founded, and which he has not waived. But no application to set aside any proceedings for irregularity will be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity (R. S. C., Ord. LXX., r. 2). And where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon should be stated in the summons, or notice of motion (*ib.* rule 3, and *Petty v. Daniel*, 34 Ch. D. 172). No costs were allowed by North, J., to a successful applicant who did not comply with this rule (*Baillie v. Goodwin & Co.*, 33 Ch. D. at p. 608). And Kay, J., has held that the applicant cannot rely upon objections for irregularity not stated in the notice of motion (*Petty v. Daniel*, 34 Ch. D. at p. 180).

Any irregularity ground for discharge.

Application should be made promptly.

The Court may, without discharging a prior irregular order for an attachment, make a second order for the like purpose (*Smith v. Stickwood*, 11 L. J. Ch. 109).

Second order for attachment.

When a person has been arrested on a writ and subsequently discharged by reason of irregularity, it seems that he may be taken again on a new writ issued under the same judgment or order (*Merchant v. Frankis*, 3 Q. B. 1, & 2 Gale & Davison, 473).

Re-arrest after discharge for irregularity.

Non-compliance with any of the rules of the Supreme Court or with any rule of practice for the time being in force does not render any proceedings void unless the

Proceedings are not void on the ground of irregularity.

Court or a Judge shall so direct, but proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit (R. S. C., Ord. LXX., r. 1). Kay, J., has applied this rule to an irregularity in practice in obtaining an attachment, and where an order for a writ of attachment to issue against a defendant was obtained on motion (the defendant not appearing), but copies of the affidavits to support the application were not served with the notice of motion, Kay, J. (being satisfied that contempt had been committed), on a motion made to set aside the order for irregularity held the order was not void by reason of the irregularity, and under the discretion given to him by rule 1 of Order LXX., refused to set it aside for irregularity, but ordered the defendant's immediate release from prison, and made no order as to costs (*Petty v. Daniel*, 34 Ch. D. 172).

What the irregularity may consist of.

The irregularity relied on for discharging the order may be non-compliance with any rule of practice; or misrepresentation, or the suppression of any material fact, when obtaining the order *ex parte* (as that the contempt had been purged, waived, or condoned). An order for an attachment was set aside with costs as irregular, because (*inter alia*) the memorandum required by Ord. XII., r. 5, had not been endorsed on the copy order served, *Shurrock v. Lillie* (4 Times L. R. 355).

Sequestration a bar to subsequent committal or attachment.

It is conceived that the issue and prosecution of a writ of sequestration to enforce a judgment or order for payment of money precludes any subsequent proceedings to enforce the same judgment or order, or punish for its disobedience, by imprisonment, and that the proceed-

ings under the sequestration would be a bar to any application for committal or attachment. But writs of attachment and sequestration may issue concurrently (*Crone v. O'Dell*, 2 Moll. 344). And sequestration may issue after the arrest of the person in default (Seton on Decrees, 5th ed., 394).

If the order for the arrest has been obtained *ex parte*, *Ex parte* order discharged for misrepresentation, upon misrepresentation or the suppression of material facts, this will be an irregularity to ground an application for discharge from custody. All *ex parte* orders obtained by misrepresentation, or the suppression of material facts, are liable to be discharged upon that ground.

If the person in custody be privileged from arrest he may move for his discharge, upon the ground of such privilege. The ground or nature of the privilege should be stated in the application, and proved by affidavit. Discharge of privileged person.

In cases other than those already referred to, a person seeking his discharge from custody for contempt, either before the expiration of the term defined for his imprisonment, or where no limit has been fixed to it, must, upon an application for his discharge from custody, throw himself upon the consideration of the Court, and should apologize for, and as far as possible, purge his contempt, and shew that he has complied, or done his best to comply with the order, and endeavour to propitiate the Court in every way. He should make an affidavit in support of his application, shewing that he has no means of satisfying the judgment or order (where it is for a money payment), and he should also (if it be the case) prove that his health is suffering by the imprisonment, and his business being injured, and that others (such as wife, children, or aged parents) depend Grounds on which contemnor may apply for his discharge.

upon his exertions for their maintenance and support. Suggestions for an affidavit to support an application for discharge from custody will be found in Appendix B. An example of an affidavit of circumstances shewing inability to pay and sickness will be found set out in *Street v. Hope*, 10 Ch. D. at p. 287 (note).

Contempt by marrying ward; terms of discharge from custody.

The Court refused to discharge a person who had been committed for contempt for marrying a ward of Court, until the certificate of the due solemnization of the marriage had been produced, and a proper settlement of the wife's property had been approved. The person having been a month in prison, an order was made for his discharge on the above conditions being complied with, without waiting for costs to be taxed (*Cox v. Bennett, Ex parte Midwinter*, 31 L. T. 88).

Person in contempt in regard to a ward not discharged from custody without paying costs.

Where M. had been committed to prison for contempt by breaking an order not to communicate with a ward of Court, and an order for his release on payment of certain costs was made, it was held, when he failed to pay them, that he had not purged his contempt, and that he was not entitled to be released as being in prison for debt under the Debtors Act (*Re M.* 46 L. J. Ch. 24).

Priority given to applications for discharge from custody.

In the Chancery Division a motion to discharge a prisoner from custody has priority over all other motions (*Ashton v. Shorrocks*, 29 W. R. 117). In the Queen's Bench Division the motion is entered for hearing in the list of motions set down for hearing, but it is conceived that leave would be given to mark it "urgent."

Forms of orders for discharge.

For forms of orders for the release of prisoners confined for contempt, and for discharge of writs of attachment for irregularity, see Seton, 5th ed., pp. 411-14.

Habeas corpus.

The Court has refused to grant a writ of *habeas corpus* to bring up a party in custody under an attachment, in

order to enable him to move in person to set it aside, *Ford v. Nassau* (1 Dowl. N. S., 681).

If once discharged from custody (unless perhaps on the ground of mere irregularity) it would seem that the offence is purged or condoned, and that the offender cannot be re-arrested; for a man cannot be taken in execution twice on the same judgment, although there be an express undertaking that he should be liable to be taken in execution again (*Blackburn v. Stupart*, 2 East. 248).

In the case of persons imprisoned for contempt of Court the official solicitor of the Supreme Court, by virtue of certain enactments passed for their relief, periodically visits Holloway Prison, and examines all prisoners confined therein for contempt, and reports to the Lord Chancellor upon their cases. And the Lord Chancellor may (in case of their poverty) assign a solicitor to take such steps as may be necessary, on their behalf, for their discharge out of custody.

Parliament also from time to time obtains (it is believed annually) a return of persons detained in prisons in England and Wales for contempt of Court.

Effect of
discharge
from
custody.

Provisions
for relief of
prisoners
for con-
tempt.

Return to
Parliament
of persons
imprisoned
for con-
tempt.

CHAPTER XIII.

THE MEASURE OF PUNISHMENT FOR CONTEMPT OF COURT.

In ancient times punishment very severe.

Old cases in *Dyer's Reports* showing the barbarous punishment awarded in old days for contempt.

THE punishment for contempt of Court was in ancient times very severe, and often cruel and barbarous.

Some curious old cases (temp. Edward III., Edward IV., Elizabeth, James I., and Charles I.) are collected in *Dyer's Reports*, showing the barbarity with which persons were punished for direct contempts constituted by either striking parties, or assaulting jurors in Westminster Hall, or throwing missiles at Judges when sitting. It seems then to have been the custom to indict and arraign (sometimes immediately) the offenders (in the cases at Westminster Hall the locality of the contempt being laid as *infra palatium et juxta magnam aulam*); and it appears that upon conviction the offenders were sentenced to, and suffered such punishments for their contempts, as perpetual imprisonment (or imprisonment at the pleasure of the Crown), the forfeiture of all lands and goods (or payment of a very heavy fine), and *having the right hand cut off*. See *Davis' Case* (2 Dyer, 188 b (10), and notes). The Bill of Rights (1688) declared "excessive fines" and "cruel and unusual punishments" illegal.

Punishment now more merciful.

The punishment of the offence has now become comparatively merciful; the severest punishment being limited to fine or imprisonment, although in some bad

cases both are inflicted; but in less serious cases an apology is accepted, and the payment of the costs of the application (which are sometimes ordered to be paid as between solicitor and client : *Plating Co. v. Farquharson*, 17 Ch. D. at p. 57; *Lyon v. Goddard*, 11 Rep. Pat. Ca. 118; *Birmingham Vinegar Brewery v. Henry*, 10 Times L. R. 586; *Jones v. Flower*, 11 Times L. R. 122) by the offender, only imposed as the penalty. It has been seen that a serious case of Contempt of Court may also be dealt with and punished on an indictment.

It is of course impossible to say what a Judge or Court would consider a sufficient punishment, or a sufficient duration of imprisonment, for a Contempt of Court. All the facts and circumstances of any particular case, and the nature of the contempt charged, must be taken into consideration, and regard must also be had to the disposition of the Court or Judge dealing with each particular case; however, the Court generally in practice leans to the side of mercy. The duration of the imprisonment should not be too long or severe (see *per Mathew, J.*, in *In re Davies*, 21 Q. B. D. at p. 238). The commitment for a time certain (except in cases under the Debtors Act, which limits the duration of the imprisonment) is "the correct," if not "the only correct" course (see *Rex v. James*, 5 Barn. and Ald., 894, and *per Willes, J.*, in *Ex parte Fernandez*, 10 C. B., N. S., at p. 39; and *per Mathew, J.*, in *In re Davies*, 21 Q. B. D. at p. 238). A commitment for a contempt till the defendant is discharged by due course of law is bad (*Rex v. James, supra*). But a general committal, or one during pleasure, for contempt seems to be lawful (see dictum *In re Special Reference from Bahama Islands* [1893], A. C. at p. 145. A person guilty of

Costs awarded as between solicitor and client.

What is a sufficient punishment for contempt.

Duration of imprisonment.

It may be for a time certain.

contempt may be ordered to be fined and imprisoned until he has asked pardon (*Carus Wilson's Case*, 7 Q. B. 849).

Practice in Chancery to commit for indefinite term. This practice preferable to fixing a term.

In the Chancery Division it is found more convenient in practice to order a general committal for an unspecified time, because that course leaves to the Judge or the Court an absolute discretion to order the discharge of the culprit from custody whenever it is thought proper; whereas if the committal be for a definite term, for a contempt of a *quasi* criminal nature, the sentence partakes of the nature of a sentence on summary conviction for a criminal offence, and it is then doubtful whether the question of discharging the culprit before the expiration of the sentence or altering the sentence must not be left to the decision of the Home Secretary (as representing the Crown) instead of to the Judge or the Court. It is doubtful whether a Judge has power to reverse or modify a sentence of imprisonment for a fixed term (*In re the Dowager Duchess of Sutherland*, the "*Times*," 6th May, 1898). The application of the Duchess Dowager of Sutherland for release from prison before the expiration of her sentence was left by the Judge to be dealt with by the Home Secretary (*In re the Dowager Duchess of Sutherland*, *supra*). In the case of the *Ilkley Board v. Lister*, 11 Times L. R. 176, Chitty, J., awarded a fixed sentence of 10 days' committal for publishing a circular which was a gross contempt.

Where sentence fixed doubtful if Judge can interfere before it expires.

Cases illustrating extent of punishment.

Witness refusing to answer.

It may be useful to give some cases illustrating the nature of the punishment awarded. In *In re Fernandez*, 10 C. B. (N. S.) 3, a witness was ordered to be imprisoned for six calendar months, and to pay a fine of £500, for contumaciously refusing to answer a question which the Judge ruled he was bound to answer.

Upon a subsequent trial the witness gave his evidence, and was discharged from custody. In *Davies' Case* (21 Q. B. D. 286) her imprisonment for disregarding an injunction not to molest the owner and tenants of certain property had continued for eighteen months. The Court evidently thought this too long a term of imprisonment for the offence. Breach of injunction.

Contempts by addressing (when the trial of an indictment was pending) public meetings, alleging that the defendant was not guilty, and that there was a conspiracy against him, and that he could not have a fair trial, were punished by a fine of £100 (*Onslow and Whalley's Cases*, L. R. 9 Q. B. 219); and in a worse case by imprisonment for three calendar months and a fine of £500 (*Skipworth's Case*, *ib.* 230); and the defendant to the indictment himself (who had committed the same contempt) was ordered to give security himself in £500, and to find one or more sureties in the like amount, to be of good behaviour, and not guilty of any contempt for three months, and to be imprisoned until such security was given (*ib.* at pp. 240-1). Addressing public meetings in a way calculated to influence a pending trial.

Comments on a pending winding-up petition were punished with a fine of £50 and costs (*In re Crown Bank*, *In re O'Malley*, 44 Ch. D. 649). Comments on pending winding-up petition.

A publication before the hearing of a winding-up petition charging fraud against the directors was punished by ordering the publisher to pay the costs of the motion to commit him (*Re Cheltenham and Swansea Railway Co.*, L. R. 8 Eq. 580; and see *Bowden v. Russell*, 46 L. J., Ch. 414).

It is competent for the Court where a contempt has been committed to take the more lenient course of granting with costs an injunction against a repetition of the offence in preference to making an order for An injunction may be granted instead of committing.

committal or sequestration (*Plimpton v. Spiller*, 4 Ch. D. 286; *Coats v. Chadwick* [1894], 1 Ch. 347).

Destroying
a document
produced in
the cause.

In the case of the Dowager Duchess of Sutherland, who destroyed a document produced for her inspection under an order, a fine of £250, imprisonment for six weeks, and payment of costs were imposed (*Sutherland v.*

Newspaper
comments
on a pend-
ing charge
of murder.

Sutherland, the "*Times*," 19th March, 1893). In a case of newspaper comments on a pending charge of murder an apology and payment of costs were accepted by the Court (*Reg. v. Armstrong*, the "*Times*," 9th May,

The like on
a pending
municipal
election
petition.

1893); and in a case of the like comments on a pending petition against the municipal election of a Councillor for a ward, at a "time of public excitement" owing to the petition, an application for an attachment was refused but *without costs* (*In re Wigan Election Petition*, 10 Times L. R. 264).

Case of a
solicitor
guilty of
misapprop-
riation of
money.

The two following cases refer to the duration of imprisonment under the Debtors Act. A prisoner, who had been a solicitor, was committed to Holloway Prison on 9th June, 1884, for having misappropriated a large amount of securities which had been placed in his hands by the trustees of a settlement. He moved on 11th July, 1884, for his discharge from custody. The affidavit in support of the motion stated that the prisoner was quite incapable of paying the money which he had misappropriated, and that he had a wife and four children dependent on him for support. One of the trustees, who had deposited the securities with him, made an affidavit in his favour, but the other opposed his release; Pearson, J., said: "If the prisoner

Dicta of
Pearson, J.,
as to extent
of punish-
ment in
that case.

"was now being tried for the crime he had committed before a Judge at the Assizes, he would, if found guilty, meet with a severe punishment; but sitting here in

“the Chancery Division he had no power to inflict that punishment. The Legislature had thought fit to do away with the imprisonment of persons for debt, and it was not his duty to revive it. If by keeping this person in prison it would be possible to obtain restitution of the money, or if he were concealing the place where the money might have been deposited, he certainly should not order his release; but as it was admitted that no good could be effected by keeping him any longer in prison, he should make an order for his release” (*In re Parnell*, W. N., 1884, p. 172).

In the case of *Treherne v. Dale* (heard by Kay, J., 20th Nov., 1884) an application was made for the release of the defendant from Holloway Prison, of which he had been an inmate since 6th October, 1884, having been committed there by the Court for disobedience of an order to pay into Court £474 3s., being part of the estate of a deceased person, of whom he was the legal personal representative. The defendant was a broker and rent-collector, and in his affidavit he stated that he was not able to pay any part of this money; that in consequence of his absence his business was utterly lost, and that he was a ruined man, and his goods had been seized and sold for rent, and that his wife and children (who were dependent upon him) were in great poverty and distress, and with the exception of three of his children (who earned a few shillings a week), were utterly unable to do anything for their support, and that he was willing to assign a life policy for £200 (all he possessed) to secure the debt, and he declared that nothing could be gained by his longer detention in prison, as he had not any money. The Judge ordered him to be discharged on his executing

Disobedience of trustee to an order to pay money into Court. Extent of imprisonment.

a proper assignment of his life policy to secure the money.

A year
for keeping
back
money.

A year's imprisonment should be treated as purging contempt by non-payment of money (*McCombe v. Gray*, 4 L. R. Ir. 432; and see proviso to sec. 4 of Debtor's Act, 1869).

Punish-
ment for
injurious
comments
in news-
paper.

Kindersley, V.C., held that ten days' lying in prison, and an humble apology to the Court, was sufficient to purge the contempt of the proprietor and publisher of a newspaper (who had published an article reflecting in gross terms on witnesses and others in a pending suit,

Apology to
parties
not con-
dition pre-
cedent to
release.

and who expressed to the Court his regret and contrition), and that it ought not to be a condition precedent to his release that he should apologize to the parties reflected upon (*Felkin v. Herbert*, 33 L. J. Ch. 294).

Solicitor
guilty of
contempt
as an officer
of the
Court, ill
and with-
out funds,
ordered to
be released.

A solicitor was arrested for disobedience to an order made against him as an officer of the Court, and afterwards applied to Huddleston, B., in Chambers, for an order to discharge him from custody, upon an affidavit stating that through illness and misfortune he was wholly without the funds to enable him to pay any part of the costs. Huddleston, B., refused the application. The solicitor appealed to the Divisional Court, and Pollock, B., and Manisty, J., allowed the appeal and ordered his release without costs (see *In re Freston*, 11

Solicitor
misapply-
ing client's
money dis-
charged
after a
month.

Q. B. D., at p. 558, note 2). One month's imprisonment was considered by A. L. Smith, J., to be sufficient punishment for a solicitor who had not complied with an order for payment of money (*Thompson v. Barrett*, 29 Sol. Journ. 707). And it appears that a solicitor was discharged

In another
case re-
leased after
three
months.

after three months' imprisonment upon his making compensation to the client whose money he had misapplied. (*In re Scard*, cited Seton on Decrees, 5th ed., 413).

A defendant who had unwittingly offended by a publication which might possibly prejudice the fair trial of the case was ordered to pay the costs, although the application was dismissed, *Yorkshire Provident Assurance Co. v. Gilbert* (11 Times L. R. 143); and a fine of £10 and costs were imposed by the Divisional Court in a case where the publisher admitted an article to be reprehensible; Wright, J., saying he was not sure the Court ought to interfere in the case, *In re the Finance Union* (11 Times L. R. 167).

Where the contempts charged were not serious contempts of Court, North, J., has held that payment of the costs of the applications to commit for the contempts was a sufficient punishment (*In re Cornish*, 9 Times L. R. 196; *In re Martindale* [1894], 3 Ch. 193.) And Stirling, J., has held the same (*Day v. Longhurst*, 41 W. R. 283). And where a party to pending proceedings published an abusive and defamatory article on his opponent and on the hearing of a motion to commit him at once apologized for his offence the Divisional Court fined the offender £25 and ordered him to pay the costs of the motion to commit him (*Reg. v. Barnardo*, the "Times," 29th Nov., 1892). But for sending before the trial letters to persons who might be witnesses thereat abusive of one of the parties to the cause, committal was ordered, *an apology at the Bar not being made* (*Wellby v. Still*, 66 L. T. 523).

Where a defendant to an action for libel published in his paper while the action was pending an article calculated to prejudice the trial, he was ordered to pay costs as between solicitor and client, and to undertake that until the trial there should be no more attempts to prejudice the course of justice by articles in his paper, and to stop

Punish-
ment of
publishers.

In cases of
mere tech-
nical con-
tempt
payment
of costs
sufficient
punish-
ment.

Contempt
in abusing
an oppo-
nent satis-
fied by
apology
and small
fine.

Abusing a
party to
possible
witnesses.

Comments
by de-
fendant
pending
action,
costs be-
tween
solicitor
and client
ordered.

£50 fine
and costs
for serious
newspaper
comments
at once
apologized
for.

the sale of the particular issue of his paper (*Birmingham Vinegar Brewery v. Henry*, 10 Times L. R. 586). A fine of £50 and payment of costs was held sufficient punishment for newspaper comments of a serious character upon a pending case, but *at once apologized for* (*Russell v. Russell*, 11 Times L. R. 38). But for a gross and deliberate contempt by a defendant in publishing a circular concerning a case, ten days in prison was awarded, although an apology was made at the bar, *Ilkley Board v. Lister* (11 Times L. R. 176). And where the comments were such that the publisher could reasonably urge that any contempt constituted by them was unintentional on his part, payment of a fine of £5 and costs as between solicitor and client was ordered (*Jones v. Flower*, 11 Times L. R. 122).

Punish-
ment for
breach of
an injunc-
tion in a
patent
action.

For a breach of an injunction not to infringe a patent a writ of attachment was ordered to issue by the Divisional Court, but to lie in the office for 14 days, and not to issue at all if within that time the offender did certain things, and the offender was ordered to pay the costs as between solicitor and client, and to account for the infringing machine (*Lyon v. Goddard*, 11 Rep. Pat. Ca. 113). In this case the offender attempted to excuse himself by alleging that he had sent the infringing machine to Germany, believing that the injunction did not extend to "foreign parts."

Punish-
ment for
sending
present to
judge.

Where a bank-note was sent by a possible litigant as a present to the Lord Chancellor, on his submission and humble apology, and in consideration of his holding a public office, he was at once discharged, the note being with his consent forfeited, to be applied in charity, and he being ordered to pay all the costs, *Martin's Case* (2 R. & M. 674).

CHAPTER XIV.

THE RIGHT OF APPEAL IN CASES OF CONTEMPT OF COURT.

It should be clearly understood that in many cases—in fact, the majority of cases—of contempt of Court no appeal lies from the decision of the Court or the Judge. In fact, there is no appeal in any of the very numerous class of cases of contempt of Court arising from what is called *an interference or attempted interference with the course of justice*. In Chapter XV. (*post*) the author has dealt with what he deems to be the necessity for legislation, giving a right of appeal in all cases of committal or attachment. The Sovereign can (as has been already seen) pardon a contempt, or remit or reduce the sentence therefor. But this does not compensate for the loss of an absolute right of appeal in due course of law, without any objection to the appeal being allowed on the ground of the discretion of the Court below, upon the disposal of which appeal the whole case would be reheard. The following cases illustrate the numerous class in which no appeal lies. In *Ex parte Fernandez* it was laid down that there is no appeal except to the Sovereign from an order of a Judge of Assize punishing for contempt (see 10 C. B., N. S., at pp. 25-6, and 30 L. J. C. P., at p. 328). In *Reg. v. Jordan* (36 W. R. 797), it was held by the Court of Appeal that the jurisdiction of the Superior Court in

In the majority of cases of contempt no appeal lies.

Cases where no appeal lies.

reviewing committals for contempt by an Inferior Court is limited to the consideration whether there were materials upon which the Judge ordering the committal could have reasonably inferred contempt, and whether the form of the committal is in accordance with one or other of the forms laid down in the County Courts Act. And the Divisional Court has held that an order of a County Court Judge fining a person for assaulting a County Court bailiff in the execution of his duty is not appealable, as the proceeding was not a "matter" within sec. 48 of the County Courts Act, 1888 (*Lewis v. Owen* [1894], 1 Q. B. 102). The Court of Appeal has also held that the discretion of a Judge to commit to prison under the Debtors Act will not be reviewed on appeal (*Crowther v. Elgood*, 34 Ch. D. 691; *Preston v. Etherington*, 37 Ch. D. 104). And in the case of *O'Shea v. O'Shea* (15 P. D. 59), it was held that no appeal lies, since the Judicature Act, 1873, in a case of contempt by comments tending to prejudice the fair trial of an action, or in fact, in any case where something is alleged to have been done to prevent, interfere with, or prejudice the course of justice. This case has been approved and followed by the Court of Appeal in Ireland (*Attorney General v. Kissane*, 32 L. R. Ir. 220), i.e. the case of an attachment against the County Inspector of Kerry for refusing to grant police protection on the execution at night of writs issued from the High Court. These decisions, and the vexed question of discretion, scarcely leave any appeal in cases of contempt.

The discretion of the Judge in the matter will not be interfered with. Where the course of justice is alleged to be interfered with no appeal lies.

No action lies against a Judge for a malicious committal. The importance of this subject is the more apparent when it is remembered that (according to a recent decision of the Court of Appeal) a Judge of a Superior Court is not liable to be sued in damages for a wrongful

committal, although he has acted in the matter "maliciously for the purpose of gratifying ill feeling" (*Anderson v. Gorrie*, 10 Times L. R. 660). A Judge, whatever his conduct, is absolutely protected from an action, but of course he may be called on to answer for his conduct to the "powers that be."

It is presumed that the only remedy of a person conceiving himself to have been unjustly committed to prison by the Court or a Judge in a case where there is no appeal would be to petition the Crown (through the Home Secretary) for a pardon or an order of release. This, it is submitted, is an unsatisfactory remedy.

Only
remedy to
petition
Sovereign
for pardon.

It is curious to find that it seems that an appeal lies from all orders to commit made in the Colonies. In *In re Pollard* (L. R. 2 P. C. 106) an appeal was allowed to the Privy Council from an order of committal of the Supreme Court of a Colony for an alleged *quasi criminal* contempt (interference with the course of justice), i.e. an alleged contempt of Court by a barrister engaged in his professional duty. But in *McDermott v. The Judges of British Guiana* (L. R. 2 P. C. 341), it was held, where the Court of a Colony was one of Record and had power to commit, that the exercise of such power was discretionary, and not the subject of appeal. But this proposition is, it is submitted, inconsistent with *Pollard's Case* (*supra*), and is now of doubtful authority, for the Privy Council has since granted leave to appeal from an order of committal for contempt made by the High Court of British Guiana (see *In re de Souza*, the "Times," 3rd December, 1888. This appeal subsequently abated owing to the death of the appellant).

Appeals
from orders
to commit
made in
the Colo-
nies per-
mitted.

This important distinction (it has been seen) exists in As to there

being no
appeal
where the
contempt
is of a
criminal
nature.

this kingdom between a contempt arising in a matter of a criminal nature and a contempt arising in a matter of a nature not criminal, namely, that an appeal lies in the latter case, but not in the former, from the decision of the Court giving leave to issue an attachment, or ordering a committal of the alleged offender. As to the former class of case, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47; *O'Shea v. O'Shea*, 15 P. D. 59; *Att.-Gen. v. Kissane*, 32 L. R. Ir. 220. As to the latter class of case, see *Reg. v. Barnardo*, 23 Q. B. D. 305;

Dictum of
Cotton,
L.J., as to
contempt
not
criminal in
its nature.

Barnardo v. Ford [1892], A. C. 326. "When a man does not obey an order of the Court, made in some civil proceeding, to do or to abstain from doing something, as where an injunction is granted in an action against a defendant, and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt of Court, that is really only a procedure to get something done in the action, and has nothing of a criminal nature in it" (*per* Cotton, L.J., in *O'Shea v. O'Shea*, 15 P. D., at p. 62).

The ques-
tion is
whether
the correc-
tion of the
contempt
is punitive
or not.

A question thus arises as to whether the correction of the contempt is punitive or disciplinary, or whether the process is merely to enforce an order in the cause for the benefit of a party. It has been held that disobedience to an order to attend before an examiner of the Court to be examined is not a contempt so far of a criminal nature as to preclude an appeal (*In re Evans, Evans v. Noton* [1893], 1 Ch. 252). According to the dictum of Cotton, L.J. (cited above), such a disobedience is not a contempt of a criminal nature. It is difficult to draw the line between contempt which is a *civil wrong* only and a contempt which is a *criminal wrong*; but it is

Difference
between
civil and
criminal
contempts.

submitted that contempt is merely a *civil wrong* where there has been disobedience of an order made for the benefit of a particular party, and that person sets the Court in motion to punish the disobedience (*per* Bowen, L.J., in *In re Evans, supra*, at p. 266); and that contempt is a *criminal wrong* where either the Court itself takes cognizance of the offence without being set in motion, or being set in motion has to deal with an alleged offence which is a public wrong as being an interference with the course of justice before or during the trial or hearing.

The Court of Appeal will not interfere with the exercise of the discretion of the Judge given by "Marten's Act," 41 & 42 Vict. c. 54 (*Preston v. Etherington*, 37 Ch. D. 104). In that case Cotton, L.J., said (*ib.* at p. 109): "The appellant has contended that in the exercise of the discretion given by 41 & 42 Vict. c. 54, we ought not to send the appellant to prison. But Mr. Justice Kekewich had that discretion given him, and must be taken to have exercised it. He exercised it in a way the appellant does not like, but he did exercise it, and if the case is one where he had jurisdiction to authorize an attachment we cannot interfere with his discretion in the exercising of it. The only question, therefore, which we have to consider is whether the Act gave him that jurisdiction." And in *Crowther v. Elgood* (34 Ch. D. 691), Cotton, L.J., is reported to have said (*ib.*, p. 697), he was of opinion, "as the Judge had jurisdiction to make the order, and the default was proved, the Court of Appeal ought not to interfere with his discretion in ordering the attachment to issue;" see also *In re Wray*, 36 Ch. D. 138, where the Court of Appeal would not interfere with the discretion of the Court

No appeal
in certain
cases from
the exer-
cise of the
Judge's
discretion.

below in refusing to attach a bankrupt solicitor for default in paying money ordered to be paid by him as a solicitor.

But an appeal lies from an order made without jurisdiction or irregularly.

But if the attachment has been improperly ordered to be issued, either without jurisdiction, or contrary to practice, the Court of Appeal will interfere. It seems, however, that it will not permit an objection not raised below to be taken on the appeal (*per* Cotton, L.J., in *Davis v. Galmoye*, 39 Ch. D. at p. 323).

The Court of Appeal will not always review a decision as to ability to pay.

The Court of Appeal will not, as a general rule, interfere with the conclusion of the Court below as to the debtor's ability or inability to pay (*Esdaile v. Visser*, 13 Ch. D. 421). But see *Chard v. Jervis* (9 Q. B. D. 178), where the Court of Appeal on further evidence took a different view as to means from that taken by the Court below.

Cases in which an appeal may be brought.

In cases not tending to interfere with the course of justice, or where the matter cannot be reasonably contended to be within the mere discretion of the Judge, an appeal lies either from the grant (*Witt v. Corcoran*, 2 Ch. D. 69), or refusal (*Jarmain v. Chatterton*, 20 Ch. D. 493) of an order to commit, or for the issue of a writ of attachment; but where the matter appears to be one which may reasonably be said to be within the discretion of the Court below, the Court of Appeal will be slow to interfere with that discretion (*Bristow v. Smyth*, 2 Times L. R. 36). An appeal will lie against an order either granting or refusing the discharge of the prisoner from custody (unless the original order of committal is one against which an appeal will not lie), but the Court of Appeal would be slow to interfere with the discretion of the Court below exercised in the matter (where the question is purely one of discretion), and particularly

Appeal upon application for discharge from custody.

in a case where the discharge from custody had been granted by the Court below.

An attachment improperly got may be discharged upon the application of a person who has submitted to it and been arrested under it (*In re Manning*, 30 Ch. D. 480). Attachment improperly got is discharged.

A bankrupt is entitled to appeal against an order committing him for contempt of Court for wilful failure to deliver up to the trustee in his bankruptcy property forming part of his estate (*In re Ashwin, Ex parte Ashwin*, 25 Q. B. D. 271). A bankrupt may appeal from an order to commit.

An order for attachment or committal under the exception of section 4 of the Debtors Act against a trustee or person acting in a fiduciary capacity, being "an order made in a civil proceeding, and not a judgment in a criminal cause or matter," an appeal lies from the order (*Crouther v. Elgood*, 34 Ch. D. 691; *Jarmain v. Chatterton*, 20 Ch. D. 493; *Witt v. Corcoran*, 2 Ch. D. 69). But the Court of Appeal will be slow to alter the decision of the Court below (*Jarmain v. Chatterton, supra*). Appeal lies from order to attach, &c., under Debtors Act.

An appeal lies to the Court of Appeal (*Reg. v. Barnardo*, 23 Q. B. D. 305), and the House of Lords (*Barnardo v. Ford* [1892], A. C. 326), against an order for an attachment for disobedience to a writ of *habeas corpus*. Appeal lies from attachment for disobeying *habeas corpus*.

It will be seen from the above review of the cases on the subject that an appeal lies from an order to commit or attach in a few cases only, and that in some of those cases the objection of "discretion" may be placed in the way of the appeal. The conclusion as to the right of appeal.

Where an appeal lies it may be had without any leave. Cases where the liberty of the subject is concerned Leave to appeal not necessary.

are expressly excepted from the operation of the Judicature Act, 1894 (57 & 58 Vict. c. 16).

Time for
appealing
to Court
of Appeal.

An appeal from an order of committal, or for leave to issue a writ of attachment, when made in open Court (whether by a Divisional Court or a Judge) must be brought within fourteen days of the date or completion (as the case may be) of the order; the notice of appeal motion is a four-day notice, and the appeal is set down and dealt with as an interlocutory appeal. A form of notice of appeal will be found in Appendix B.

Appeals
from orders
in Cham-
bers.

Appeals from a like order made by a Judge at Chambers do not appear to be appeals in "matters of practice and procedure" within the Judicature Act, 1894, *Ex parte Sheriff of Lancaster* (the "*Times*," 11th February, 1895), and therefore lie in the Queen's Bench Division to a Divisional Court and not to the Court of Appeal.

Time for
appeals
from
Chambers.

Notice of appeal from such an order made at Chambers must be served in the Chancery Division within fourteen days, and in the Queen's Bench Division within five days from its date.

Practice in
Chancery
Division.

In the Chancery Division, unless the Judge at Chambers certifies that he wants no further argument on the subject, an application to him in Court to discharge his order in Chambers, to be made within fourteen days of its date, is a condition precedent to an appeal therefrom.

CHAPTER XV.

THE NECESSITY FOR LEGISLATION REGARDING THE LAW
OF CONTEMPT OF COURT.

THE jurisdiction as to contempt of Court and the punishment following upon it, whether by fine or imprisonment, are so indefinite and uncertain, and the mode of convicting of it and the manner of punishing it *so much more consonant with the feelings and necessities of ancient times than with those of modern days*, that it may reasonably be said that the whole subject of contempt of Court and its punishment ought now to be dealt with, regulated, limited, and defined by Act of Parliament. It is believed that in France the offence has been so defined and limited.

The jurisdiction in contempt ought to be dealt with by Parliament.

In the year 1883, the then Lord Chancellor (the Earl of Selborne) attempted to do this to some extent, and with that object introduced into the House of Lords the "Contempts of Court Bill."

Bill brought in by Lord Selborne for that purpose.

In moving the first reading of that Bill on the 8th of March, 1883, his Lordship is reported to have said (Hansard, vol. 276, p. 1707): "Speaking of Courts of civil and criminal jurisdiction in England and Ireland, he might divide contempts generally into two distinct classes. The first class were contempts of the Court itself, not consisting in disobedience to its orders, and these might be committed either by persons who were entirely strangers

Speech of Lord Selborne on moving first reading.

Speech of
Lord Sel-
borne—
continued.

to any proceedings pending, or by persons who were parties to those proceedings. The other class of contempts consisted of disobedience to the orders of a Court, and was necessarily confined to the parties to proceedings before the Court. The first class of contempts, not consisting of disobedience to orders of the Court, might be subdivided into two kinds: first, those taking place in the face of the Court, as by some insult offered by some person present to the presiding Judge, or by some interruption of the proceedings, making interference necessary; and, secondly, into contempts not committed in the face of the Court, but outside, by proceedings calculated to obstruct, or interfere with, or improperly prejudice, the administration of justice in proceedings pending before the Court. Proceedings taken by Courts to vindicate themselves against both these descriptions of contempt were strictly necessarily penal, though they had also for their object the deterring others from committing the like offences. There was, however, a distinction between these two kinds of contempt which might be committed either by parties or strangers to proceedings—namely, that all Courts of Record (Inferior as well as Superior) had power by reasonable fine and reasonable imprisonment; and, in the case of Inferior Courts—doubtless, subject to revision—to punish contempts committed in face of the Court, but Inferior Courts had no power to punish contempts committed elsewhere. The Superior Courts, on the other hand, had power to punish contempts of that class committed elsewhere, as well as those committed in face of the Court. The punishment for those contempts of both kinds was by fine or imprisonment, or both. *The law did not fix any limit to the power of the Courts in the*

infliction of these punishments. As he had already stated, the power of punishment by Inferior Courts was subject to revision, but Superior Courts were not subject to any similar superintendence. *Although, doubtless, the Judicature Acts had made all orders of the High Court subject to appeal, yet it had never been the practice to appeal against orders of that description.* Before speaking of Ecclesiastical Courts, he would revert to the class of contempts committed by persons against whom orders had been made, and who had disobeyed those orders. The object of punishing contempts of that class was partly penal and partly to compel obedience to the orders of the Court. As cases of this class could not arise in Courts purely criminal, but only in Courts of civil jurisdiction, the power of punishment in those cases was by imprisonment only, and not by fine. With respect to the Ecclesiastical Courts, they had no direct power to punish for any contempts whatever, but contempts of both the principal classes he had indicated, both those committed in face of the Court, which disturbed the proceedings of the Court, and those which consisted in disobedience to orders made, were dealt with by statute. The first of the statutes now in force upon that subject was passed in the 53rd year of George III. It was therein provided that when an Ecclesiastical Court declared a party to be contumacious or in contempt, the fact should be certified to the King in Chancery, and then there issued out of Chancery a writ called 'de con. cap.,' under which the contumacious or contemptuous party was committed to prison, a form of order being prescribed by the statute under which he was to remain in prison until he submitted himself to the Court, or something to that effect. The statute contained no

Speech of
Lord Sel-
borne—
continued.

Speech of
Lord Sel-
borne—
continued.

provisions either as to any fixed term of imprisonment or as to any means of putting an end to it if the party did not submit himself to the authority of the Court. . . . To deprive Courts of the power of punishing for contempts would be impossible—Judges must have the power of summarily vindicating their authority—but *it did not follow that the power should be indefinite and under no legal regulations.* He should be the last person to pass adverse criticisms upon the way in which the Judges had exercised the powers which the law had vested in them. When they had exercised the particular power under consideration they had done so from a sense of duty and under the pressure of grave public necessity. But it was strictly consistent with the confidence which he felt, generally, in their judgment to point out *the serious inconveniences which might arise from the want of landmarks laid down by law with regard to the measure of punishment, however clear the offence might be.* The jurisdiction in matters of contempt was in its nature a penal jurisdiction, and depended very much on the discretion of Judges. It was exercised summarily, and in a manner which was entirely exceptional. *It was impossible not to see that a jurisdiction of that kind was liable from time to time to provoke censure, which, though it might be entirely unmerited, could not be met and answered by the distinguished public servants who were the subjects of attack."*

Short effect
of Lord
Selborne's
Bill.

The effect of the Bill brought in by Lord Selborne was (shortly), to limit every sentence for contempt to a period not exceeding three months' imprisonment, and to limit the power of fining to £500. If after the three months there was a continuance of the contempt,

or a repetition of it, it was provided that the Court should have power to continue the imprisonment. Other provisions in the Bill applied to Ecclesiastical Courts. In the case of wilful breach of an injunction granted by the High Court of Justice, it was provided that the Court might summarily assess the damage, and make the offender liable for it. The case of wards of Court seduced or clandestinely married or otherwise interfered with was not affected by the Bill. The Bill did not get beyond the introductory stage, and has never been revived.

All will agree that some such Bill as this (which was brought in by the Earl of Selborne as long ago as 1888) ought to become law.

In the year 1894 a Bill was prepared and brought into Parliament (by Mr. McCartan, Mr. Morton, Mr. Sexton, Mr. Byles, and Mr. Knox) to "amend the law relating to imprisonment for Contempt of Court," by which it was proposed to be enacted that, (1) on and after the passing of that Act it should not be lawful for the Judge of any Court in the United Kingdom to sentence any person to a term of imprisonment longer than four weeks for a contempt of his Court; and (2) that Contempt of Court should be an indictable misdemeanour, and should be punishable by imprisonment without hard labour for a period not exceeding six months: Provided that no Judge before whom the case in connexion with which the contempt was alleged to have arisen should sit as a member of the Court before which the alleged contempt was tried; and provided that in cases where the contempt was a refusal or neglect to obey an order of a Court, a prisoner under sentence for the contempt should be released on his

brought in
in 1894 to
amend
law as to
contempt.
The provi-
sions of
that Bill.

apology to the Court and obeying its order, notwithstanding that he should not have served the term of imprisonment to which he was sentenced for the contempt. This Bill met with the same fate as the Earl of Selborne's Bill, and did not proceed further than its initial stage.

Parliament
should give
right of
appeal in
all cases of
contempt.

In particular, Parliament should take into its consideration the decisions prohibiting any appeal in all cases of contempt of Court by interference with the course of justice. For a statement of the several cases of contempt in which no appeal lies, see Chapter XIV. (*ante*), on the right of appeal in cases of contempt of Court. It will be seen that in the great majority of cases no appeal lies.

An appeal
ought to
lie in all
cases of
committal
for con-
tempt.

It is submitted that an appeal ought to lie in every class of case of committal for contempt, with power to stay (on application to the Court for the purpose) such of those appeals as could be shewn to be clearly frivolous or vexatious; and that no security for the costs of such an appeal should be ordered merely on account of the poverty of the appellant. It is difficult to understand why mere poverty should, coupled with the inability to give security for costs, prevent a man from trying to escape from an order for his imprisonment fairly conceived to be unjust or erroneous. Personal liberty is equally valuable to and necessary for all. It is obvious that even a day's imprisonment would ruin some men, who might thereby lose their characters and be deprived of their situations or other means of livelihood.

Persons
may be
imprisoned
by order
of a Judge
without

It may surprise some persons to know that according to the law of England the liberty of the subject may at any time be summarily interfered with for an indefinite period, or that any one may be fined in a large

amount, without any right of appeal, at the will of an individual, for an alleged offence, the limits of which offence in its nature it puzzles the lawyer to strictly, or even adequately, define. Practically, in every other case of imprisonment ordered, except after the verdict of a jury (even from a summary conviction by a magistrate, see 42 & 43 Vict. c. 49, s. 19) an appeal now lies. It is submitted that the liberty of the subject ought not to be interfered with by the order of a Judge or of a Court without giving in all such cases a right of appeal. In fact, no Englishman ought ever to be placed in such a position with regard to an alleged contempt of Court by him which he denies as to be forced to exclaim with the Psalmist, "I am so fast in prison: that I cannot get forth" (Psalm lxxxviii. v. 8, *Prayer-book Version*).

In February, 1892, a Bill was prepared and brought into the House of Commons (by Mr. Warmington, Q.C., Mr. Finlay, Q.C., Mr. Cozens-Hardy, Q.C., The Hon. Bernard Coleridge, Q.C. (now Lord Coleridge), Mr. Gainsford Bruce, Q.C. (now Mr. Justice Bruce), and Mr. Augustine Birrell, Q.C.) for giving an absolute right of appeal to all persons committed to prison or attached for contempt of Court by any order of the High Court of Justice. The following is a copy of the text of this Bill. (1) "From and after the passing of this Act every "order of Her Majesty's High Court of Justice, or of "any Judge or Judges thereof, upon any motion or "application to commit any person to prison, or for an "order that a writ of attachment do issue against any "person for contempt of Court, and every order made "by the said Court or by any Judge or Judges thereof "without any motion or application for such committal,

any right
of appeal.

In other
cases of
imprison-
ment
appeals lie.

Bill
brought
into House
of Com-
mons in
1892 to
give right
of appeal,
but aban-
doned.

Text of
the Bill.

“or that an attachment do issue, shall be the subject
 “of an appeal to the Court of Appeal. (2) Every order
 “made as mentioned in the first section shall be an
 “interlocutory order within the meaning of the Judi-
 “cature Acts, 1873 to 1891, and the Rules of the
 “Supreme Court. (3) An appeal shall lie to the House
 “of Lords from any order made by the Court of Appeal
 “upon such an appeal as aforesaid, and from every
 “original order made by the Court of Appeal for
 “committal of, or that an attachment do issue against
 “any person for contempt of Court. (4) This Act may
 “be cited as the Contempt of Court (Appeal) Act, 1892.”

Observa-
 tions on
 the Bill.

This Bill was a good one as far as it went, but it will be observed that it omitted to give a right of appeal to persons committed or attached by orders of County or other inferior Courts, so as to prevent the application of the principle laid down in *Reg. v. Jordan* (36 W. R. 797). As the Bill stood, there would have been a right of appeal from all cases in the High Court, but no such right in many cases in inferior Courts. Having regard to the provisions of the Judicature Act, 1894 (57 & 58 Vict. c. 16), sect. (2) of the Bill ought not now to become law.

Bill not
 proceeded
 with.

For some reason this Bill (brought into the House of Commons with leave by so many eminent practical lawyers) was not further proceeded with, but was abandoned by its learned authors. It is desirable that some such Bill as this should become law.

CHAPTER XVI.

THE MANNER IN WHICH PERSONS COMMITTED FOR CONTEMPT OF COURT ARE DEALT WITH IN PRISON.

It may be found both useful and instructive to make some remarks upon the manner in which persons committed for contempt of Court are treated while in prison. It is considered that it may be thought unsatisfactory merely to conduct such persons to the door of the prison and leave them there; and that it will be found interesting to tell them somewhat of the treatment they may expect within its walls.

Section 41 of the Prisons Act, 1877 (40 & 41 Vict. c. 21), enacts that any person who shall be imprisoned under any rule, order, or attachment for contempt of any Court shall be treated as *a misdemeanant of the first division*, within the meaning of section 67 of the Prisons Act, 1865 (28 & 29 Vict. c. 126). That section is as follows:—"In every prison to which this Act applies prisoners convicted of misdemeanour, and not sentenced to hard labour, shall be divided into at least two divisions, one of which shall be called the first division, and whenever any person convicted of misdemeanour is sentenced to imprisonment without hard labour it shall be lawful for the Court or Judge before whom such person has been tried, to order, if such

Treatment
in prison
of those
detained
for con-
tempt.

Prisons
Act, 1877,
s. 41.

Prisons
Act, 1865,
s. 67.

Meaning
of words
"criminal
prisoner."

Court or Judge think fit, that such person shall be treated as a misdemeanant of the first division ; and a misdemeanant of the first division shall not be deemed to be a criminal prisoner within the meaning of this Act." Criminal prisoner means any prisoner charged with or convicted of a crime (28 & 29 Vict. c. 126, s. 4). And see *Osborne v. Milman* (18 Q. B. D. 471) as to meaning of "criminal prisoner," from which case it would seem that it means a person convicted and sentenced for an offence which has "all the essential elements of a crime." A person committed to prison for acting as a solicitor though not duly qualified was therefore held to be a "criminal prisoner" (*Osborne v. Milman, supra*); but the case of a solicitor struck off the rolls for allowing his name to be used by an unqualified person, has been held not to be a *criminal* matter (*In re Eede*, 25 Q. B. D. 228).

Rules to
regulate
the treat-
ment in
prison of
misdemeanants
of the first
division.

Rules were made in February, 1878, by the Secretary of State, under the authority of the Prisons Acts, 1865 and 1877, to regulate the treatment in prison of *misdemeanants of the first division*. By these rules, prisoners of this class are to be confined in a cell or room specially appropriated to them, and are not to be placed in association or at exercise with criminal prisoners. The Visiting Committee are empowered to permit such prisoners to have at their own cost the use of private furniture and utensils suitable to their ordinary habits, and to have for certain purposes the assistance of a servant appointed by the Governor. They may further supply their own food, subject to such restrictions as may be necessary to prevent luxury or waste, and may wear their own clothing. The Visiting Committee may also accord them the privilege of receiving visitors to a reasonable extent. They

take exercise as the rules require apart from the criminal prisoners. See the statement of the Home Secretary (The Right Honourable H. H. Asquith, Q.C., M.P.), made in the House of Commons with regard to the Dowager Duchess of Sutherland's Case, the "*Times*," 28th April, 1898.

Statement
of Home
Secretary
in the
"Suther-
land Case."

The following is the text of the official rules on the subject — "They (the Visiting Committee) shall permit misdemeanants of the first division to have supplied to them, at their own expense, such books, newspapers, or other means of occupation other than those furnished by the prison, as are not in their opinion, or, in their absence, pending their approval, in the opinion of the Governor, of an objectionable kind. They shall, on the application of any misdemeanant of the first division, permit him to wear his own clothing, provided that it is sufficient, and is fit for use; and to supply his own food under the restrictions made in respect thereto; also, if, having regard to his ordinary habits and condition of life, they think such special provision should be made in respect to him, they shall permit any such prisoner:—

Text of the
rules regu-
lating the
treatment
in prison
of misde-
meanants
of the first
division.

- "(1) To occupy, on payment of a small sum fixed by the Commissioners, a room or cell fitted for such prisoners, and furnished with suitable bedding and other articles, in addition to or different from those furnished for ordinary cells;
- "(2) To have, at his own cost, the use of private furniture and utensils, suitable to his ordinary habits, to be approved by the Governor.
- "(3) To have, on payment of a small sum fixed by the Commissioners, the assistance of some person, to be appointed by the Governor, relieving him

“from the performance of any unaccustomed tasks
“or offices.”

Diet, &c.,
permitted
in prison.

As a rule, *misdemeanants of the first division* who can pay for them are permitted to have food and other necessary refreshment sent into the prison for their consumption from any hotel or restaurant near to the prison. The “*menu*” sanctioned *under ordinary circumstances* provides for a plain breakfast with “a relish;” a dinner consisting of a joint, two vegetables, and pudding; and a “high” tea or supper with fish, ham, or eggs, or both. Fowls are not always regarded as forbidden luxuries, nor are soles. The caterers (knives and forks being forbidden) facilitate matters by carving cold fowls into tit-bits, and slicing soles, in order that they may be eaten with a wooden fork or spoon.

Visits,
books,
medical
attendance,
&c., per-
mitted.

Visits of relations and friends are permitted (subject to the regulations) to the persons detained, and proper newspapers and books are allowed for the use of such persons. Medical attendance (either of the prison doctor or of the ordinary medical adviser of the person detained) is, when necessary, or desired by the person detained, permitted.

Treatment
of the
Dowager
Duchess of
Sutherland
in prison.

It appears that the Dowager Duchess of Sutherland (who on 18th March, 1893, was committed for contempt of Court in destroying a document produced to her under an order) was on arriving at Holloway Prison conducted as a “*chancery prisoner*” to the right (or female) side of the prison, and thence to her “cell,” which was a *roomy apartment* about 25 feet long by 15 feet wide, fitted up in comfortable style by a firm of well-known furniture-dealers, the chairs being upholstered in blue plush. The apartment was brightened by tapestry hangings and the floor carpeted. In one

corner of this "cell" were a brass bedstead, a toilet suite, and a bright fender and fireirons, all adding to its "cheerful appearance." Some well-known confectioners were allowed to cater for the Dowager Duchess during her detention, and she was to be able to receive visits from her friends and to read newspapers and books (see the "*Times*," 22nd April, 1898).

It therefore abundantly appears that persons with means can when committed to prison for contempt of Court make themselves fairly comfortable during their sojourn there, and that the loss of their liberty is about the only penalty they pay.

Persons
with means
can make
themselves
comfort-
able in
prison.

APPENDIX A.

MEMORANDUM AS TO THE PRACTICE UPON COMMITTAL AND ATTACHMENT (WITH TWO FORMS) PREPARED BY G. LAVIE, ESQ., ONE OF THE REGISTRARS OF THE SUPREME COURT, AT THE SUGGESTION OF ONE OF THE LEARNED JUDGES OF THE COURT.

"Attachment is directed to the Sheriff who lodges the prisoner in the county gaol. Committal is executed by the tipstaff, who brings the prisoner up to the Court prison at Holloway, whatever part of the country he may take him in. The latter is probably the more expensive and less convenient practice, except where the person committed is actually present in Court. In such a case the tipstaff need not wait for the order to be drawn up, but can act upon a memorandum signed by the Registrar (see Form I.).

"This memorandum is handed to the tipstaff, who leaves it on lodging the prisoner with the keeper of the prison, and the order is subsequently drawn up and a copy sent to the keeper.

"The tipstaff, who was formerly in attendance in the Lord Chancellor's Court, has now a room opposite to Appeal Court II., and he is bound to keep the Registrar's messenger informed where he is to be found.

"If, however, he is not forthcoming, which is sometimes the case, the Court can appoint one of the ushers to take the prisoner.

"A memorandum is in such case signed by the Judge himself. (See Seton, 5th ed., p. 410.)

"If the person committed is not present in Court, the order has to be drawn up, passed and entered, and is given by the solicitor to the tipstaff, who does not act upon the order till he has obtained the Lord Chancellor's warrant (see Form II.). This necessitates some delay, as the Lord Chancellor's own signature is required, but the tipstaff does not proceed without it, as he considers that he would not be entitled without it to call upon the bystanders to assist him in arresting the prisoner.

"The difference between attachment and committal before the Judicature Act was well established. *A man was committed for doing what he ought not to do, and attached for not doing what he was ordered to do.*

"This distinction is to a great extent done away with by Order XLII., rule 7, under which a judgment (which includes an order, see Order XLII., rule 24), requiring a person to do an act other than payment of money, or to abstain from doing anything, may be enforced by attachment or committal. But it is submitted that a large class of cases yet remains unaffected by this rule; as, for example, where there is a breach of an undertaking, misconduct towards a ward, interference with a receiver, unjustifiable comment on a pending case, or what may be called personal contempt of the Court (as in the *Egg Case*), in none of which is there any enforcement of an order to do or to abstain from doing anything.

"This point was suggested as regards a breach of undertaking in *Callow v. Young*, where Chitty, J., had, on an affidavit of service of a notice for attachment, made an order. His Lordship directed the case to be re-argued on the point whether committal or attachment was the proper remedy, and also on another point to be referred to hereafter, as to the necessity of personal service of the notice of motion. But counsel elected to serve a fresh notice rather than re-argue the point, and on the fresh notice the defendant appeared.

"It is submitted that the correct view is that these special contempts are still regulated by the old practice, under which committal rather than attachment was the absolutely

correct remedy, though attachment being considered less than committal, it would under the old practice have been open to the person aggrieved, to ask for an attachment rather than a committal.

"The distinction is still important in reference to a question as to the necessity of personal service of the notice of motion, as to which there is, I think, some misapprehension.

"It must be borne in mind that where attachment was the proper remedy under the old practice, the attachment issued as a matter of course without any order on production to the proper officer of the order, directing the act to be done and evidence of the default in doing it, but no one could be committed without an order for that purpose, which order was made either in cases where the offender was present in Court, or if made on notice of motion required personal service of such notice. The reason for this distinction probably was, that whether the person to be attached had or had not done what he was ordered to do, was a simple question of evidence, but that the question whether what he had done was or was not a breach of the order was one for judicial determination, or in other words the contempt in the latter case had to be adjudicated.

"By Order XLIV., rule 2, no attachment is to be issued without leave, to be applied for on notice to the party against whom the attachment is to be issued.

"The question arose whether a notice of motion now for the first time required by reason of this rule was to be personally served, and in *Browning v. Sabin* the late Master of the Rolls decided that service of such notice, in the manner pointed out for service of any other notice not requiring personal service, was sufficient.

"But it is submitted that this applies only to cases where before the rule the attachment would have issued without any adjudication of the contempt, and that the late Master of the Rolls had no intention to alter the existing practice, which was not in question before him, but only to hold that the new rule did not involve the adoption of the old practice

that personal service was requisite when the result of the motion would be to affect the liberty of the subject.

"This seems reasonable, as the intention being that the suitor should not have the power of imprisoning any one without the intervention of the Court, full effect could be given to this limitation of the rights of the suitor by allowing the notice now for the first time rendered necessary to be served on the solicitor, instead of imposing on the party aggrieved the burden of effecting personal service. But this did not necessitate any alteration in the practice which required personal service in all cases where it was necessary that the contempt should be adjudicated, and the leave of the Court was required before the attachment could be issued.

"No one, I think, has yet contended that *Browning v. Sabin* applies to a notice to commit, and I do not see how the obligation of personal service can be got rid of merely by applying for an attachment instead of a committal in a case where committal was the remedy before the Judicature Act.

"The true rule would appear to be that a notice for leave to issue an attachment which, but for the Judicature rule, the party moving would have been enabled to issue without leave, does not require to be personally served, but that a notice of motion for leave to issue an attachment which the party moving could never have issued without leave requires, as before the Act, to be personally served.

"The Debtors Act requires, perhaps, separate notice. The six weeks' committal under section 5 is not the same as ordinary committal, but is executed by any Sheriff or officer to whom it is directed by one of the Masters of the Supreme Court (see Seton, 4th ed., p. 1566, but the description "Holloway" Prison in the form is incorrect). There seems no doubt that the notice of motion for such an order would require personal service, but there may be some question as to a notice of motion for attachment under the Debtors Act. It is not necessary to adjudicate the contempt, but it is necessary for the Court to be satisfied that the case is within the

exceptions of the Act. So it may be considered not a case in which the attachment would have issued altogether as of course, but it is a case in which there could be no contest whether there had or had not been a breach of the order.

"*Browning v. Sabin* was a case of payment into Court, but it was decided on the language of the Judicature rule, not with reference to the Debtors Act.

"I have referred to the original order which it was there sought to enforce, and the language of it shews so clearly that the case was within the exceptions of the Debtors Act, that I think it may be assumed that under it an attachment would have issued without further order, had it not been for the Judicature rule. But, even if it be held that this case is a conclusive authority, that personal service of a notice of motion for an attachment under the Debtors Act is not necessary, it is submitted that this apparent exception to what has been suggested as the true rule is more apparent than real. For it is not strictly accurate to say that the leave of the Court was required before the Judicature rule for the issue of an attachment under the Debtors Act.

"The officer issuing the attachment would not take upon himself the responsibility of determining whether the particular case was within the exceptions of the Debtors Act, and required to have this stated on the face of an order, and the more convenient way of stating it (where it did not appear in the original order) might be by giving leave to issue an attachment.

"But if the officer had issued the attachment without any such leave, and even without any such statement, the attachment could not have been set aside as it now might be, on the ground that the leave of the Court to issue it had not been obtained. It would have been sufficient to shew in answer to an application to set it aside, that the case was in fact within the exceptions of the Debtors Act.

"No second order was required if the original order for payment shewed clearly that the case was within the exceptions, or had on the face of it a statement, 'and this order may be enforced by attachment.' This statement, however,

did not mean 'liberty is hereby given to enforce this order by attachment,' but 'this order is one which may, having regard to the provisions of the Debtors Act, be enforced by attachment.'

"It should also be noticed that, as pointed out by Mr. Justice Chitty in *Harvey v. Harvey*, attachment for debt is not really process of contempt, but process of execution, which originally issued like any other process of execution as of course, and which in the cases excepted from the Debtors Act, the suitor was still entitled to issue without leave until the Judicature rule.

"In every case the notice of motion, whether personally served or not, must state in general terms the ground of the application, and the affidavits intended to be used on the hearing must be served together with the notice of motion (Order LII., rule 4). This will not, of course, include the affidavit of service of the notice of motion, but (notwithstanding the decision of Pearson, J., to the contrary) is considered to include all other affidavits which are necessary to establish the case for attachment, such as the affidavit of service of the order and of default.

"The question of notice of motion only has been here dealt with, as the strong opinion expressed by the Court of Appeal in *Davis v. Galmoye*, that such applications in Chancery should not be made by summons, seems to render it unnecessary to discuss that course of procedure."

FORM I.

A. v. B.

Date.

The defendant (name) is for contempt in disobeying an order made in this cause by Mr. Justice on the day of committed to the custody of the keeper of Her Majesty's Gaol at Holloway, to be kept in safe custody until the further order of this Court.

FORM II.

Lord Chancellor's Warrant.

In the High Court of Justice, (after Order to Commit)
 Chancery Division,
 Lord Chancellor,
 Mr. Justice .

A. v. B.

Whereas by an order made by his Lordship, Mr. Justice , in the above action, bearing date the . It was ordered that the said defendant do stand committed to Holloway Prison for his contempt in the said order mentioned. These are therefore in pursuance of the said order, to will and require you forthwith upon receipt hereof, to make diligent search after the body of the said , and wheresoever you shall find him to arrest and apprehend him, and him safely convey to Holloway Prison, there to remain until further order. Willing and requiring all Mayors, Sheriffs, Justices of the Peace, Headboroughs, Constables, and all other Her Majesty's loving Subjects to be aiding and assisting to you in the due execution of the premises, as they tender Her Majesty's service, and will answer the contrary thereof at their peril, and this shall be to you and any of you who do the same a sufficient warrant.

Dated this day of in the year of our
 Lord, 18 .

To Mr. Amos Hawkins, the
 Tipstaff attending Her
 Majesty's High Court of
 Justice, Chancery Division } (Signed)

APPENDIX B.

GENERAL FORMS.

FORMS FOR COMMITTAL, ATTACHMENT, SEQUESTRATION, &c.

No. 1.

AFFIDAVIT OF SERVICE OF ORDER SOUGHT TO BE ENFORCED.

(Proper Title of Action or Matter.)

I, C. D., of , in the county of , clerk to Mr. of aforesaid, the solicitor for the plaintiff in this action, make oath, and say as follows :—

(1.) On the day of , 189 , I served the defendant A. B. (or A. B., of, &c., *as case may be*), at , in the county of , with the judgment (*or order*) in this action, dated the day of , 189 , the duplicate of which is now produced and shewn to me and marked C. D. (1), by delivering a true copy of such judgment (*or order*) to, and leaving the same with the said defendant A. B. (or the said A. B.) at , in the county of , and I at the same time produced and shewed to the said defendant A. B. (or the said A. B.) the said duplicate of the original judgment (*or order*) duly marked and sealed.

[If the defendant be a Corporation, service should be effected on the Town Clerk, Clerk, Secretary, Public Officer, or other proper official.]

(2.) The copy of the said judgment (*or order*) so served as aforesaid, had endorsed upon it at the time of the said service thereof, a memorandum in the words following (that is to say), "If you, the within-named (A. B.), neglect to obey this judgment (*or order*) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (*or order*)."

[It is necessary that this should be stated in the affidavit, *Stockton Football Co. v. Gaston*, [1895], 1 Q. B. 453; W. N. 1895, p. 10.]

No. 2.

FORM TO BE INDORSED ON ORDER SOUGHT TO BE ENFORCED
(ORDER XLL, RULE 5).

"If you, the within-named (A. B.), neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)."

No. 3.

NOTICE OF MOTION FOR COMMITTAL FOR BREACH OF JUDGMENT OR ORDER.

(*Proper Title of Action or Matter as in No. 1, ante.*)

And where the application is against a person not a party to the cause, or where there is no cause, add: And in the matter of an application against (A. B.) for an alleged contempt of Court.

Take notice that this Honourable Court will be moved before (*in the Chancery Division* "The Honourable Mr. Justice ," or *in the Queen's Bench Division* "The Divisional Court"), sitting in the Royal Courts of Justice, in the Strand, in the County of Middlesex (*in the Chancery Division* "on Friday the day of next," or *in the Queen's Bench Division* "at the expiration of two clear days from the date hereof"), at the sitting of the said Court, or so soon thereafter as Counsel can be heard by Counsel on behalf of the plaintiff (*or otherwise as the case may be*). That the defendant A. B., or (*where not a party*) the above-named A. B., of , in the county of (*or otherwise as the case may be*), may be ordered to stand committed to the Holloway Prison for his contempt [*here state the act or non-feasance complained of, and which constitutes a breach of the judgment or order, and if it be for default in the payment of any money say, "in making default in paying to the plaintiff (or into Court, as the case may be) the sum of £ "*], pursuant to (*or in breach of*) the judgment (or order) in this action, dated the day of , 189 . And that the said defendant (or the said A. B., '*as the case may be*') may be ordered to pay to the applicant his costs of and incidental to this application, and the order to be made thereon, or that such further or other order may be made as the circumstances of the case may require. And further take notice that the applicant intends to read and use in support of the said application the affidavits and

evidence set forth in the schedule hereto, copies of which are served with this notice of motion. [*If in the Queen's Bench Division, add: And further take notice that this motion will be entered in the list of motions to be heard by the Divisional Court, and will be heard in due course accordingly, and (if so) that application will be made for leave to have this motion marked "urgent" for early hearing, and that if such leave be granted, this motion will be accordingly heard and disposed of as an urgent motion without further notice to you.*]

Dated this day of , 189 .

Yours, &c.,

C. D.

To
The Defendant
A. B.

1, Grays Inn Square,
W.C.
Solicitor for the Plaintiff.

The Schedule before referred to.

- (1.) Affidavit of C. D., proving service upon you of judgment (*or order*) sought to be enforced.
- (2.) Exhibit therein referred to, and being the duplicate of the judgment (*or order*) sought to be enforced.
- (3.) Affidavit of E. F., proving the breach on your part of (*or your non-compliance with*) such judgment (*or order*).
- (4.) *If so.* Exhibits (*or exhibit*) referred to in the last-mentioned affidavit.

No. 4.

NOTICE OF MOTION FOR LEAVE TO ISSUE A WRIT OF ATTACHMENT.

(*Title and formal parts as in No. 3, ante.*)

That he may be at liberty to issue a writ or writs of attachment against the defendant A. B. (*or as the case may be*), for his contempt in not (*or in*) [*here state the act required to be done or abstained from, as in Form No. 3*], pursuant to the judgment (*or order*) herein, dated the day of , 189 . And that the defendant A. B. (*or as the case may be*) may be ordered to pay to the applicant his costs of this application, and also his costs of and incidental to the issuing and execution of the said writ or writs of attachment, or that such further or other order may be made, &c. (*conclude as in Form No. 3*).

No. 5.

NOTICE OF MOTION FOR COMMITTAL OR (IN THE ALTERNATIVE) FOR
LEAVE TO ISSUE A WRIT OF ATTACHMENT.

(Title and formal parts as in No. 3, ante.)

That the defendant A. B. *(or otherwise, as the case may be)* may be ordered to stand committed to Holloway Prison for his contempt in not *(or in)* [*here state the act required to be done or abstained from, as in Form No. 3*], or *(in the alternative)* that the plaintiff *(or otherwise, as the case may be)* may be at liberty to issue a writ or writs of attachment against the defendant A. B. *(or otherwise, as the case may be)* for his contempt aforesaid. And that the said defendant *(or as the case may be)* may be ordered to pay to the applicant his costs of this application, and also his costs of and incidental to the issuing and execution of any such writ or writs of attachment as aforesaid, or that such further or other order may be made, &c. *(conclude as in Form No. 3).*

No. 6.

NOTICE OF MOTION FOR LEAVE TO ISSUE A WRIT OF SEQUESTRATION
AGAINST A CORPORATION.

(Title and formal parts as in No. 3, ante.)

That a writ or commission of sequestration, may issue directed to certain commissioners to be therein named, to sequester all the property and effects (real and personal) of the above-named defendant Corporation, for the contempt of such Corporation in wilfully disobeying the judgment *(or order)* made in this action on the of , 189 , in not *(or in)* [*here state the act required to be done or abstained from, as in Form No. 3*], and until the said Corporation shall clear its said contempt, and this Court make other order to the contrary. And that the said Corporation may be ordered to pay to the applicant his costs of and incident to this application, and also his costs of and incidental to the issue and execution of such sequestration as aforesaid, or that such further or other order may be made, &c. *(conclude as in Form No. 3, so far as the same applies).*

No. 7.

AFFIDAVIT TO SUPPORT APPLICATION FOR ORDER OF COMMITTAL OR
LEAVE TO ISSUE A WRIT OF ATTACHMENT OR SEQUESTRATION.*(Proper Title as in No. 1, or 3, ante.)*

I, E. F., of _____, in the county of _____, the above-named plaintiff
(*or as the case may be*), make oath and say as follows:—

(A.—*If judgment or order for payment of money to any person or into Court.*)

(1.) By the judgment (*or by an order made*) herein, dated the _____ of _____, 189 _____, it was ordered that the above-named defendant A. B. should (*state the mandatory part ordering payment of the money*).

(2.) The said defendant (*or as the case may be*) was duly served with such judgment (*or order*), as by the affidavit of service filed herein in that behalf appears.

(3.) The said defendant (*or as the case may be*) has not paid to me or to any one on my behalf the said sum of £ _____, mentioned in the said judgment (*or order*) or any part thereof, but the whole thereof is still due and owing to me, and remains wholly unpaid and unsatisfied. Or, has only paid to me or on my behalf the sum of £ _____, part of the said sum of £ _____ mentioned in the said judgment (*or order*), leaving £ _____, the balance thereof due to me and wholly unsatisfied. Or, has not paid into Court pursuant to the said judgment (*or order*) the said sum of £ _____ therein mentioned, or any part thereof, as appears by the certificate in that behalf of the Paymaster-General, now produced and shewn to me marked E. F. (1.)

(4.) *If the judgment or order does not shew on its face that the money was trust money, or that the default is that of a solicitor, or other circumstances to bring the case within the exceptions mentioned in section 4 to the Debtors Act, 1869, here set forth the facts shewing that the case does come within one or other of those exceptions.*

(5.) I have, except where it hereinbefore appears to the contrary, deposed to the circumstances aforesaid, speaking from personal knowledge.

(B.—*If judgment or order for doing or abstaining from any act.*)

(1.) By the judgment (*or by an order made*) herein, dated the _____ of _____, 189 _____, it was ordered that the above-named defendant A. B. (*or defendant Corporation, or as the case may be*) should (*here state the mandatory part ordering the doing of or the abstaining from doing the act in question*).

(2.) The said defendant (*same as paragraph 2, ante.*)

(3.) That the said defendant (*or defendant Corporation, &c.*) has,

contrary to or in breach of the said judgment (or order) [*here state the circumstances strictly proving the neglect to do the act ordered, or the doing of the act ordered not to be done*].

(4.) I have, except, &c. (*conclude as in paragraph 5, ante*).

No. 8.

ORDER FOR COMMITTAL.

(*Proper Title of Action, &c., as in No. 1, or No. 3, ante.*)

Upon motion, &c., by counsel for the plaintiffs and upon reading, &c. (*here set out the evidence read and proving the contempt alleged, and state the nature of the conduct constituting such contempt*). And this Court being of opinion that the defendant A. B. has, by such conduct as hereinbefore appears, been guilty of a contempt of this Court, doth order that the said A. B. do stand committed to (*Holloway*) Prison for his said contempt, and that he do pay to the plaintiff his costs of and occasioned by this application.

ANOTHER FORM OF ORDER FOR COMMITTAL.

(*Proper Title of Cause as in No. 1, or No. 3, ante.*)

Upon motion, &c., by counsel for the plaintiffs, and upon reading the decree dated, &c., the order dated, &c., an affidavit of, &c., filed, &c., and an affidavit of service of notice of this motion on the defendant A. B. And it appearing by the said affidavits (*the order should set out the alleged contempt as stated in the affidavits*). This Court being of opinion that the defendant A. B. has, by such conduct, been guilty of a contempt of this Court, doth order that the said A. B. stand committed to Prison for his said contempt, and that he do pay to the plaintiff his costs of and occasioned by this application.

No. 9.

WRIT OF ATTACHMENT.

(*Proper Title of Action, &c., as in No. 1, or No. 3, ante.*)

Victoria, by the grace of God, &c., to the Sheriff of , Greeting.
We command you to attach A. B., so as to have him before us in the

Division of our High Court of Justice, wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he, it is alleged, hath committed against us, as also such other

matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf; and hereof fail not, and bring this writ with you. Witness, &c.

Notice to Sheriff.—This writ, if issued for default in payment of money, is subject to the following limitations:—

If issued under section 4 of the Debtors Act, 1869, it does not authorize imprisonment for any longer period than one year.

If issued under section 5 of the same Act, it does not authorize imprisonment for any longer period than six weeks.

Indorsement.—This writ was issued by, &c., solicitor for the , who reside at , and was issued pursuant to order dated the day of , 189 , for such default as is therein mentioned [*being a default in payment of money under section 4 (or section 5) of the Debtors Act, 1869*] or [*not being a default in payment of money*].

No. 10.

WRIT OF SEQUESTRATION.

(*Proper Title of Action, &c., as in No. 1, or No. 3, ante.*)

Victoria, by the grace of God, &c.

To (names of not less than four Commissioners), greeting.

Whereas, lately in the Division of our High Court of Justice in a certain action there depending, wherein A. B. is plaintiff, and C. D. and others are defendants (*or in a certain matter then depending, intituled "In the matter of E. F.," as the case may be*) by a judgment (*or order, as the case may be*) of our said Court, made in the said action (*or matter*), and bearing date the day of , 189 , it was ordered that the said C. D. (*or the said Corporation*) should [*here recite the judgment or order so far as it directs the payment of money into Court, or other act*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D. (*or the said Corporation*), and to collect, receive and sequester into your hands, not only all the rents and profits of his (*or its*) said messuages, lands, tenements, and real estate, but also all his (*or its*) goods, chattels, and personal estates whatsoever; and therefore we commend you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said C. D. (*or the said Corporation*), and that you do collect, take, and

get into your hands not only the rents and profits of his (*or its*) said real estate, but also all his (*or its*) goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. (*or the said Corporation*) shall [*here state the act to be done, as in the judgment or order*] clear his contempt, and our said Court make other order to the contrary. Witness, &c.

No. 11.

NOTICE OF MOTION FOR DISCHARGE FROM CUSTODY ON THE
GROUND OF PRIVILEGE.

(*Title and formal parts as in No. 3, ante.*)

Upon the part of (the defendant) A. B. (*or as the case may be*) at present a prisoner in Prison, that the order made herein, dated the of , 189 , and whereby the applicant was ordered to stand committed to prison for an alleged contempt (*or whereby a writ of attachment was ordered to issue against the applicant*), may be discharged (*and the writ of attachment issued thereunder set aside*), and the release of the applicant forthwith from prison ordered upon the ground of privilege, the said A. B. having been at the time of his arrest on his way to attend Court (*or a summons*) as solicitor on behalf of in an action of C. v. D. pending in the High Court (*or set out any other ground of privilege upon which the applicant may rely*), and that A. J., the person on whose behalf the said writ was issued (*or the said order of committal was obtained*), and (*if writ of attachment and circumstances justify it*) E. F., Esq., the Sheriff, and G. H., his officer, may be ordered to pay to the applicant his costs occasioned by the execution of the said attachment and of this application and consequent thereon, or that such further or other order may be made as the circumstances of the case may require.

Dated this day of , 189 .

To the plaintiff and to
Messrs. ——— his
solicitors or agents,
and (*if so*) to the
said Sheriff and his
said officer.

Yours, &c.,
A. B.
of (in person)
or
C. D.
of, &c.,

Solicitor for the said A. B.

No. 12.

NOTICE OF MOTION TO DISCHARGE FROM CUSTODY ON THE GROUND
OF IRREGULARITY.*(Title and formal parts as in No. 3, ante.)*

On behalf of (the defendant) C. D., a prisoner in the custody of the governor of Prison (*or as the case may be*), under a writ of attachment issued pursuant to an order dated the day of , 189 (*or under an order of committal made herein and dated, &c.*), that the said order may be discharged (*and the writ of attachment issued pursuant thereto set aside*) on the ground that (*here state clearly the alleged irregularity, as, for instance, that the order dated the of , 189, for breach of which the said writ of attachment issued, did not bear the indorsement provided by the Rules of the Supreme Court, Order XLI, r. 5*), and that the applicant may be discharged out of custody as to his said contempt, and that the plaintiff (*or as the case may be*) may be ordered to pay to the applicant his costs of and relating to the said order and the said attachment, and consequent thereon and of this application such costs to be taxed, or that such further or other order may be made (*conclude as in No. 11, ante*).

No. 13.

NOTICE OF MOTION FOR DISCHARGE FROM CUSTODY UPON PURGING
CONTEMPT.*(Title and formal parts as in No. 3, ante.)*

Upon the part of (the defendant) A. B. (*or as the case may be*), now a prisoner in Prison, by virtue of an order dated the day of , 189 , for the contempt therein mentioned of this Honourable Court, that having purged his said contempt he may be discharged from the custody of the governor of the said prison, as to such contempt with all usual and necessary directions, or that such further or other order may be made, &c. (*conclude as in No. 11, ante*).

No. 14.

NOTICE OF MOTION FOR DISCHARGE FROM CUSTODY ON GROUND OF
WANT OF MEANS AND SUFFICIENT DURATION OF IMPRISONMENT,
OR OTHERWISE.*(Title and formal parts as in No. 3, ante.)*

Upon the part of (the defendant) A. B. (*or as the case may be*), now a prisoner in Prison, by virtue of an order of this Honourable Court, dated the day of , 189 , whereby he was committed to prison (*or whereby a writ of attachment was ordered to issue against him*) for non-payment of the sum of £ due from him (*state in what capacity the sum was due, e.g. as trustee, &c.*), that he may forthwith be discharged from custody, upon the ground that he has been a prisoner under and by virtue of the said order (*or the said writ*) in Her Majesty's Prison at since the of , 189 , and also on the ground that he is wholly unable to pay the said sum of £ or any part thereof, or upon such other ground or grounds as to the Court shall seem fit, or that such further or other order may be made, &c. (*conclude as in No. 11, ante*).

No 15.

SUGGESTIONS FOR AFFIDAVIT TO SUPPORT APPLICATION FOR
DISCHARGE FROM CUSTODY.*(Proper Title as in No. 1, or No. 3, ante.)*

I, G. H., of , in the county of , make oath and say as follows:—

(1.) I have since the of , 189 , been and am now a prisoner in the Prison, to which I was committed under an order made herein on the of , 189 (*or, to which I was taken after being arrested under a writ of attachment issued under an order made herein on the of , 189*).

(A.—*If privilege be claimed as ground for discharge.*)

(2.) That I was and am privileged from such committal (*or arrest*) and imprisonment as aforesaid by reason of [*here state specifically the ground or grounds upon which, in the particular case, privilege from arrest is claimed*].

(B.—*If irregularity be ground of application.*)

(2.) That such order by virtue of which I was so committed and imprisoned as aforesaid (*or by virtue of which such writ of attachment was issued as aforesaid*) was obtained *ex parte* and irregularly. Such

irregularity consisted in the particulars following, namely [*here set forth clearly and with particularity the grounds of irregularity alleged*].

(C.—*If apology and sufficient duration of imprisonment be ground of application.*)

(2.) That in not obeying the order of the Court for disobedience to which I was so committed (or arrested) and imprisoned as aforesaid [*or, in printing and publishing or causing to be printed or published the article (or news or paragraph) complained of (or other act complained of), and for which I was so committed, &c.*], I had not the least intention of committing a contempt of Court (*if so, and offence be non-payment of money, "but my non-compliance with such order is due solely to my want of means"*), and I unreservedly express my regret for not obeying the said order (or for my offence aforesaid), and I do hereby apologise humbly to the Court for the same.

(3.) My confinement in prison has been and is a serious loss and injury to me in my business of a and otherwise. And (*if it is so*) [*both myself and my wife and family are suffering thereby, and my health is being much injured by the continuance of such imprisonment*]. (N.B.—*If health suffers have evidence, if possible, of a medical man on the subject.*)

(4.) I am quite unable to pay the said sum of £ or any part thereof. My trade (or business) of a has been almost ruined by my imprisonment. I have a wife and (*state number*) children altogether dependent upon me, and they are now in the greatest poverty and distress. I have no property of any kind (*if any, add "except," and enumerate the particulars, and say, if possible, that they are of small value*). I shall be ruined by any longer imprisonment (or generally *state such of the circumstances of the particular case as may be calculated to induce the Court to direct the discharge of the prisoner*).

(*Whatever the form of the particular affidavit conclude.*)

(5.) I have, except where it hereinbefore appears to the contrary, deposed to the above circumstances, speaking from personal knowledge.

No. 16.

FORM OF WRIT OF NE EXEAT REGNO.

(*Proper Title of Action or Matter.*)

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of greeting.

Whereas, it is represented unto us in our High Court of Justice on the part of A. B. plaintiff, against C. D. defendant, amongst other

things, that he the said defendant is greatly indebted to the said plaintiff, and designs quickly to go into parts beyond the seas as by oath made in that behalf appears, which tends to the great prejudice and damage of the said plaintiff. Therefore, in order to prevent this injustice, we do hereby command you that you do without delay cause the said C. D. personally to come before you, and give sufficient bail or security in the sum of that he the said C. D. will not go or attempt to go into parts beyond the seas without leave of our said Court. And in case the said C. D. shall refuse to give such bail or security, then you are to commit him the said C. D. to our next prison, there to be kept in safe custody until he shall do it of his own accord. And when you shall have taken such security, you are forthwith to make and return a certificate thereof to our said High Court of Justice, distinctly and plainly under your seal, together with this writ.

Witness, the Right Honourable Lord High Chancellor of
Great Britain, the day of , in the year of Our Lord, One
thousand eight hundred and .

The writ must be indorsed as follows :—Take security in the sum of [*set out in words the sum mentioned in the order.*] The indorsement must be signed by the solicitor of the party issuing the writ, or by the party himself if he is suing in person, and in either case the address of the party signing and the capacity in which he signs (*e.g.* solicitor for the plaintiff), should be given.

No. 17.

FORM OF NOTICE OF MOTION TO DISCHARGE ORDER FOR ISSUE OF A
WRIT OF NE EXEAT REGNO.

(*Title and formal parts as in No. 3, ante.*)

(1.) That the order made herein and dated the day of
189 , under and by virtue whereof a writ of *ne exeat regno* was issued
against the said defendant (*or as the case may be*) A. B., may be dis-
charged. (2.) That the said writ may be superseded. (3.) That the
bond given by the said defendant A. B. to the Sheriff of , pursuant
to the said order and writ, may be delivered up to be cancelled.
(4.) That an enquiry may be made as to the damages sustained by
the said defendant A. B., by reason of the said order of the day
of , 189 , having been made, and that the above-named plaintiff

(*or as may be*) C. D., may be ordered within fourteen days after the signing of the Chief Clerk's certificate of the result of such enquiry to pay to the said defendant A. B. the sum thereby certified to be the amount of such damages. And (5.) That the said plaintiff C. D. may be ordered to pay to the said defendant A. B., the taxed costs of and incident to this application, and of and incident to the said enquiry. *Or* (6.) That such further or other order may be made as the circumstances of the case may require (*conclude as in No. 11, ante*).

No. 18.

FORM OF ORDER TO ARREST DEFENDANT UNDER SECTION 6 OF THE DEBTORS ACT, 1869.

(*Title and Number of Action.*)

Upon hearing counsel (*or solicitor, as the case may be*) for the above-named plaintiff A. B., and upon reading (*enter the evidence used on the hearing of the application*). It is ordered that the defendant C. D. be arrested and imprisoned for the term of six months (*or as may be*) from the date of his arrest, including the day of such date, unless and until he shall sooner deposit in Court the sum of £ , or give to the said plaintiff a bond executed by him and two sufficient sureties in the penalty of £ , or some other security satisfactory to the said plaintiff. [That he will not go out of England without the leave of the Court] *or if the action is for a penalty or sum in the nature of a penalty other than a penalty in respect of any contract, say*, [That any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison.]

And it is further ordered that the Sheriff of do within one calendar month from the date hereof, including the day of such date, and not afterwards, take the defendant for the purpose aforesaid, if he shall be found in the said Sheriff's bailiwick.

Dated the day of , 189 .

No. 19.

FORM OF ORDER FOR ARREST, &c., UNDER SECTION 118 OF THE
COMPANIES ACT, 1862.*(Proper Title of Matter.)*

Upon motion this day made unto this Court by counsel for A. B., the official liquidator of the above-named company, and upon reading [*enter the evidence and undertaking in damages if any undertaking be given*]. And it appearing that there is probable cause for believing that the said C. D. in the said affidavit named, being a contributory of the said company, is about to quit the United Kingdom or otherwise abscond, and to remove or conceal certain of his goods and chattels for the purpose of evading payment of a call made by the said liquidator, and for avoiding examination in respect of the affairs of the said company, this Court doth order that the said C. D. in the said affidavit named, be arrested and safely kept until such time as this Court shall order. And it is further ordered that the said A. B. do cause to be seized, the books, papers, moneys, and securities for moneys, goods and chattels of the said C. D. And it is further ordered that the said books, papers, moneys, securities for moneys, goods and chattels when so seized, be safely kept until such time as this Court shall order. And it is further ordered that the several Sheriffs in England, within whose bailiwick the said C. D. may be found, do cause him to be arrested and safely kept until such time as this Court may order. And it is further ordered that the costs of the said liquidator of this motion and order, and proceedings thereunder, be part of his costs in the liquidation.

No. 20.

FORM OF NOTICE OF APPEAL.

In the Court of Appeal.

(Proper Title.)

Take notice that Her Majesty's Court of Appeal, sitting in the Royal Courts of Justice, will be moved by way of appeal, at the expiration of four days from the date hereof or so soon thereafter as counsel can be heard, by counsel on the part of _____, that the order made herein, and dated the _____ of _____, 189 _____, may be

discharged, and that in lieu thereof (*state order desired*), and that
(*party who got order*) may be ordered to pay the appellant's
costs of this appeal and in the Court below, or that such further or
other order may be made as the circumstances of the case may require.

Dated the day of , 189 .

To the said
and to

Yours, &c.,

his Solicitor or Agent.

Solicitor for the Appellant.

APPENDIX C.

PROVISIONS (SECTS. VII. TO XVIII.) OF THE STATUTE (NOW IN PART REPEALED AND IN OTHER RESPECTS OBSOLETE) 38 HEN. 8, CAP. 12 [1541], FOR THE EXECUTION OF JUDGMENT TO HAVE "THE RIGHT HAND STRICKEN OFF" FOR THE OFFENCE OF STRIKING IN THE KING'S PALACE.

"VII. And if any person or persons so arraigned be found guilty for malicious striking, by reason whereof blood is, hath been, or shall be shed, against the King's peace, within the said palace or house, or any other house, or any other the said house or houses; that then every such person or persons shall from henceforth have judgment by the said lord great master or lord steward, (if he be present) and in his absence by the other afore named, before whom such person or persons shall be so found guilty, to have his right hand stricken off before the said lord great master, or lord steward, if he be there present, and in his absence before the said treasurer, comptroller, and steward of the *Marshallsey*, or two of them at the least, whereof the said steward to be one, and at such place or time as he or they before whom such person or persons shall be so found guilty, shall appoint execution to be done; (2) and the same execution to be done by such person as the said lord great master, or lord steward, if he be there present, and in his absence as the said treasurer, comptroller, and steward of the *Marshallsey*, or two of them, whereof the steward to be one, shall name or appoint; (3) and also shall have judgment to have perpetual imprisonment during his life, and shall pay fine

The judgment for striking in the king's palace, whereby blood shall be shed.

Who shall do execution.

and ranom at the King's majefty's pleafure, his heirs and fucceffors.

The king's officers attendant at the execution. "VIII. And for the further declaration of the folemn and due circumftance of the execution appertaining, and of long time ufed and accuftomed, to and for fuch malicious

Chief furgeon.

ftrikings, by reason whereof blood is, hath been, or hereafter fhall be shed, againft the King's peace: (2) it is therefore enacted by the authority aforefaid, That the ferjeant or chief furgeon for the time being, or his deputy, of the King's houfhould, his heirs and fucceffors, fhall be ready at the time and place of execution as fhall be appointed, as is aforefaid, to fear the ftump when the hand is ftricken off.

Sergeant of the pantry.

"IX. And the fergeant of the pantry for the time being of the fame houfhould, or his deputy, fhall be alfo then and there ready to give bread to the party that fhall have his hand fo ftricken off.

Sergeant of the cellar.

"X. And the fergeant of the cellar for the time being of the fame houfhould, or his deputy, fhall be alfo then and there ready with a pot of red wine, to give the fame party drink, after his hand is fo ftricken off, and the ftump feared.

Sergeant of the ewry.

"XI. And the fergeant of the ewry for the time being of the fame houfhould, or his deputy, fhall alfo be then and there ready with clothes fufficient for the furgeon to occupy about the fame execution.

Yeoman of the chandry.

"XII. And the yeoman of the chandry for the time being of the fame houfhould, or his deputy, fhall alfo be then and there, and have in readinefs feared clothes, fufficient for the furgeon to occupy about the fame execution.

The mafter cook.

"XIII. And the mafter cook for the time being of the fame houfhould, or his deputy, fhall alfo be then and there ready, and bring with him a dreffing knife, and fhall deliver the fame knife at the place of execution to the fergeant of the larder for the time being of the fame houfhould, or to his deputy, who fhall be alfo then and there ready, and hold upright the dreffing knife till execution be done.

The fergeant of the larder.

The fergeant of the poultry.

"XIV. And the fergeant of the poultry for the time being of the fame houfhould, or his deputy, fhall be alfo then and there ready with a cock in his hand, ready for the furgeon

to wrap about the same stump when the hand shall be so stricken off.

"xv. And the yeoman of the scullery for the time being Yeoman of the same household, or his deputy, to be also then and of the there ready, and prepare and make at the place of execution scullery. a fire of coals, and there to make ready fearing-irons against the said surgeon or his deputy shall occupy the same.

"xvi. And the fergeant or chief ferror for the time being The chief of the same household, or his deputy, shall be also then and ferror. there ready, and bring with him the fearing-irons, and deliver the same to the same fergeant or chief surgeon, or to his deputy, when they be hot.

"xvii. And the groom of the scullery for the time being of Groom of the same household, or his deputy, shall be also then and the scullery. there ready with vinegar and cold water, and give attendance upon the said surgeon, or his deputy, until the same execution be done.

"xviii. And the fergeant of the wood-yard for the time The fer- being of the same household, or his deputy, shall bring to geant of the said place of execution a block, with a betil, a staple, and yard. the wood- cords, to bind the said hand upon the block, while executing is in doing."

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